



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

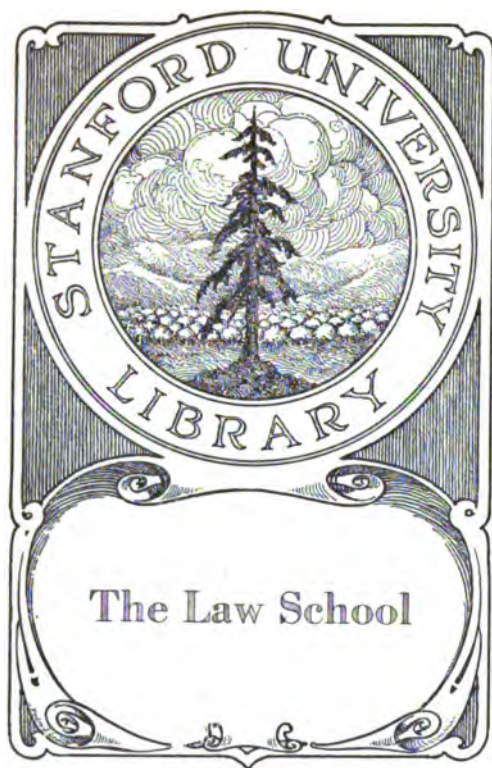
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



CZ
ACR
PNZ

1/2

Thomas Comyn
Jberty
A
T R E A T I S E

OF THE

From the Author

L A W

RELATIVE TO

CONTRACTS AND AGREEMENTS

Not Under Seal.

WITH CASES AND DECISIONS THEREON
IN THE ACTION OF ASSUMPSIT.

IN FOUR PARTS.

By SAMUEL COMYN, Esq.

OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

VOL. I.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, LAW-BOOKSELLER, FLEET-STREET,
AND J. COOKE, ORMOND QUAY, DUBLIN.

1807.

L 5203
FEB 10 1932

ABRU BROTHAT

ADVERTISEMENT.

THE numerous questions which have arisen in the Courts of Common Law upon Contracts and Agreements, make it desirable to have a ready access to the determinations respecting them.

With this view the Author was first led to undertake the following Work, which he now submits to the Public in the hope that, from its arrangement, it will be found an useful book of reference, and obviate the necessity of a long and laborious research into the vast variety of detached Reports of Cases upon the subject.

S. C.

Serjeant's Inn, Fleet Street,
October 25th, 1807.

T A B L E

OF THE

C O N T E N T S.

VOLUME THE FIRST.

PART THE FIRST:

OF THE NATURE AND REQUISITES OF A CONTRACT
AND AGREEMENT BY PAROL.

CHAP. I.

	Page.
<i>Of the Nature of a Contract and Agreement by Parol; and of Express and Implied Contracts and Promises</i>	1

CHAP. II.

<i>Of the Consideration necessary to support a Contract or Agreement</i>	8
--	---

CHAP. III.

<i>Of Illegal Contracts</i>	30
-----------------------------	----

CHAP. IV.

<i>Of the Statute of Frauds and Perjuries upon Contracts and Agreements</i>	47
---	----

CHAP. V.

Page.

<i>Of the Stamping of Contracts, Agreements, Bills, Notes,</i>	
<i>&c.</i>	130

PART THE SECOND:

OF THE PARTIES TO A CONTRACT, AND THEIR
REPRESENTATIVES, &c.

CHAP. I.

<i>Of Contracts with Infants</i>	148
----------------------------------	-----

CHAP. II.

<i>Of Contracts with Married Women; and of the Husband's Liability to Contracts made by the Wife either before or after Marriage</i>	171
--	-----

CHAP. III.

<i>Of Contracts with Master and Servant</i>	218
---	-----

CHAP. IV.

<i>Of Principal, Factor, and Agent</i>	234
--	-----

CHAP. V.

<i>Of Contracts by Agents of Government, &c.</i>	272
--	-----

CHAP. VI.

<i>Of Contracts by Partners</i>	285
---------------------------------	-----

CHAP. VII.

<i>Of Owners, Masters, and Seamen of Merchant-ships</i>	330
---	-----

CHAP.

CHAP. VIII.

Page.

Of Contracts and Agreements with Parish Officers - 395

CHAP. IX.

Of Trustees - - - - - 404

CHAP. X.

Of Bankrupts and their Assignees - - 406

CHAP. XI.

Of Executors and Administrators - - - 541

VOLUME THE SECOND.

PART THE THIRD:

OF PARTICULAR CONTRACTS AND AGREEMENTS WITH
REFERENCE TO THE ACTION OF ASSUMPSIT.

CHAP. I.

Of Money Had and Received - - - 3

CHAP. II.

Of Money Lent and Advanced - - - 138

CHAP. III.

Of Money Paid - - - - - 149

CHAP. IV.

Of Money Due upon an Account Stated - - 206

CHAP. V.		Page.
<i>Of Interest</i>	- - - - -	207
CHAP. VI.		
<i>Of Contracts for the Sale of Goods</i>	- - -	209
CHAP. VII.		
<i>Of Contracts to Accept or Transfer Stock</i>	- - -	245
CHAP. VIII.		
<i>Of Contracts of Warranty upon Sales</i>	- - -	263
CHAP. IX.		
<i>Of the Bailment of Goods with Carriers, Wharfingers, Warehousemen, &c.</i>	- - - - -	288
CHAP. X.		
<i>Of Contracts to Deliver up Securities, &c.</i>	- - -	348
CHAP. XI.		
<i>Of Contracts for Necessaries</i>	- - - - -	350
CHAP. XII.		
<i>Of Contracts for Services and Works</i>	- - -	358
CHAP. XIII.		
<i>Of Contracts to Marry; and to Pay Money in Consi- deration of Marriage</i>	- - - - -	408
CHAP. XIV.		
<i>Of Agreements to Pay Money in Consideration of For- bearance, or of Discharging or Proving a Debt</i>	- - - - -	419
CHAP. XV.		
<i>Of Agreements for the Relinquishment, or Sale of Offices, &c.</i>	- - - - -	452
CHAP.		

CHAP. XVI.

	Page.
<i>Of Agreements in Restraint of Trade</i> - -	467

CHAP. XVII.

<i>Of Agreements not to take Advantage of a Communication of the Particulars of a New Invention</i> - -	481
---	-----

CHAP. XVIII.

<i>Of Wagers</i> - - - - -	486
----------------------------	-----

CHAP. XIX.

<i>Of Bonds made in Scotland, (not under Seal)</i> - -	508
--	-----

CHAP. XX.

<i>Of Contracts for Use and Occupation of Houses, &c.</i> -	510
---	-----

CHAP. XXI.

<i>Of Contracts to Take and to Repair Houses, &c.</i> -	526
---	-----

CHAP. XXII.

<i>Of Tithes Bargained and Sold; and of Agreements for a Composition in lieu of Tithes</i> - - -	531
--	-----

PART THE FOURTH:

OF THE CONSTRUCTION OF CONTRACTS :
AND OF THE ACTION OF ASSUMPSIT.

CHAP. I.

<i>Of the Construction of Contracts and Agreements</i> -	532
--	-----

CHAP. II.

<i>Of Agreements with a Penalty or Stipulated Damages</i>	537
---	-----

CHAP. III.

<i>Of the Action of Assumpsit</i> - - - -	548
---	-----

INDEX

OF

CASES CITED.

A.		Vol. Page	Vol. Page	
ABEL v. Sutton	i	315	Atherfold v. Beard	ii 493
Adam v. Richards	ii	279	Atkins v. Banwell	i 397
Alcinbrook v. Hall	ii 144,	151	Atkyns v. Amber	i 247
Alcorn v. Westbrook	ii	348	Audley v. Duff	ii 102
Alderfon, assignee, &c. v. Temple	i	456	Aylesford's, Earl of, case	i 81
Aldridge v. Ewen	ii	355	Ayliff v. Archdale	i 160
Alexander v. Owen	ii	223	Ayliffe v. Tracy	i 73
Alfred v. Marquis Fitz-james	i	228	B.	
Allen, administrator, &c. v. Dundas	i	524	Back v. Owen	ii 214
	ii	51	Baillie v. Mondigliani	i 352
Allen v. Keeves	i	135	Bainbridge v. Pickering	i 156
— v. Hearn	ii	496	Ballantine v. Golding	i 416
Alpaz v. Watkins	ii	61	Bamford v. Burrell	i 413
Alves v. Hodson	i	138	Banfield v. Leigh	i 248
Amic v. Andrews	ii	450	Bank of England v. Glover	ii 143
Anchor v. the Governor and Company of the Bank of England	ii	37	Barber v. Dennis	i 224
Anderson v. Hayman	i	55	— v. Fox	ii 425
	ii	237	Barclay v. Gooch	ii 185
Andrews v. Cawthorne	ii	135	Barjeau v. Walmsley	ii 144
Anstey v. Marden	i	65	Barlow v. Bishop	i 172
Appleton v. Binks	i	253	Barnes v. Freeland	i 462
Aquillar v. Rodgers	ii	101	Barrett v. the Duke of Bedford	ii 198
Arden v. Sharpe	i	314	Baston v. Butter	ii 361
Armstrong, administrator, &c. v. Smith	i	378	Bartlett v. Viner	ii 402
Artaza v. Smallpiece	i	360	Beale v. Thompson	i 374
Aspinall v. Pickford	ii	320	Beauchamp v. Borrett	ii 73
Astley v. Reynolds	ii	115	Bell v. Drummond	i 228
— v. Weldon	ii	542	Bent v. Puller	i 506
			Bermon v. Woodbridge	ii 94
			Berry v. Young	ii 66
			Beesford	

	Vol. Page		Vol. Page
Besford v. Saunders	i 428	Butterfield v. Burroughs	ii 275
Bever v. Tomlinson	ii 325	Buxton v. Bedall	i 144
Bexwell v. Christie	i 257	Byne v. Playne	ii 433
Bidmead v. Gale	ii 501	— v. Pattinson	i 358
Biggs v. Lawrence	ii 243		
Bilbie v. Lumley	ii 40		
Bingham v. Serle	ii 23		
Birch v. Wright	ii 512		
Bize v. Dickafon	i 510		
Blachford v. Preston	ii 461		
Blackstone v. Pye	ii 505		
Blight v. Page	i 345		
Bloxam v. Fell	i 291		
Boehm v. Bell	ii 98		
Bolton v. Prentice	i 186		
— v. Hillerfden	i 239		
Bordenave v. Gregory	ii 257		
Bolden v. Sir John Thinn	i 23		
Bourne v. Mafon	i 27		
	ii 565		
Bowman v. Nichol	i 141		
Boyer v. Dodsworth	ii 132		
Bradley, assignee, &c. v. Clark	i 439		
Brand v. Boulcott	ii 188		
Bree v. Holbech	ii 63		
Brett v. Pretymen	ii 450		
Bristow v. Eastman	i 152		
Broom v. Davis	ii 362		
Brown v. Bullen	i 511		
— v. McKinally	ii 45		
— v. Berkeley	ii 506		
Browne v. Garborough	ii 415		
Browning v. Morris	ii 131		
Buchanan v. Parnshaw	ii 231		
Buckler v. Buttivant	ii 171		
Buckmaster v. Harrop	i 83		
Buckmyr v. Darnall	i 51		
Bull v. Sibbs	ii 513		
Buller v. Harrison	i 250		
— v. Fisher	ii 325		
Bulling v. Frost	ii 507		
Bulstrode v. Gilburn	ii 561		
Burdon v. Webb	ii 202		
Burrough v. Skinner	i 255		
	ii 24		
Butcher v. Andrews	ii 139		
Butler v. Rhodes	ii 438		
		C.	
		Cailiff v. Danvers	ii 343
		Camfield v. Gilbert	ii 62
		Campbell v. Hall	ii 27
		Campion v. Nicholas	i 369
		Capp v. Topham	ii 205
		Carpenter v. Marnell	i 419
		Carter v. Boehm	ii 108
		Cartwright v. Rowley	ii 41
		Cas v. Waterhouse	i 114
		Castling v. Aubert	i 63
		Cary v. Webster	i 251
		— v. White	i 339
		— v. Crisp	i 430
		Chambers v. Griffiths	ii 53
		Chamberlain v. Porter	i 135
		Champion v. Plummer	i 118
		Chandeler v. Lopus	ii 266
		Chandler v. Parkes	i 165
		Chaplin v. Rogers	i 97
		Chapman, assignee, &c. v. Frazer	ii 108
		Charlewood v. the Duke of Bedford	i 115
		Chater v. Beckett	i 70
		Chesman and Wife v. Nainby, in error,	ii 477
		Child v. Hardyman	i 211
		Chilton v. Whiffen	i 413
		Chinnery v. Blackburne	i 361
		Chorley v. Bolcot	ii 377
		Clark v. Shee	ii 129
		— v. Gray	ii 301
		Clarke v. Leslie	i 159
		Clay v. Willan	ii 298
		Clayton v. Andrews	i 92
			100
		— v. Adams	i 173
		— v. Jennings	ii 505
		Clerk v. Wright	i 110
		Cobden v. Kendrick	ii 49
		Cockshott	

82

	Vol Page		Vol Page
Cockshott v. Bennett	ii 441	Davies v. Ridge	i 404
Coggs v. Bernard	i 19	Davis v. James	ii 315
	ii—288, 335	—— v. Mafon	ii 480
Cole v. Saxby	i 164	Davison v. Heslop	ii 422
—— v. Gower	i 401	Dawes v. Peck	ii 317
Coles v. Trecothick	i 114	De Berkom v. Smith	i 294
Collins v. Blantern	i 30	De Gaillon v. L'Aigle	i 181
Collis v. Lowell	i 429	Deeks and wife v. Strutt	i 549
Colt v. Netterville	i 90	Derry v. the Dutchess of	
Connor v. Martin	i 172	Mazarine	i 180
Cook v. Jennings	i 352	Dewberry v. Chapman	ii 85
Cooke v. Tombs	i 115	DeSymons v. Minchwich	ii 223
—— v. Munstone	ii 79	Dilk v. Keighley	i 149
—— v. Oxley	ii 211	Dimdale v. Lancheester	ii 13
—— v. Ludlow	ii 233	Dobson, assignee, &c. v.	
—— v. Loxley	ii 524	Lockhart	i 489
—— v. Whorwood	ii 568	Doe ex dm Lord Saye &	
Coope v. Eyre	i 298	Sale v. Guy	i 552
Cooper v. Martin	ii 350	Drinkwater v. Goodwin	i 267
Cooper v. Elston	i 99	Duffit v. James	ii 362
Cordron v. Lord Masserene	ii 203	Dunlop v. Waugh	ii 277
Cotton v. Thurland	ii 124	Dutch v. Warren	ii 81
Cox, assignee, &c. v. Mor-		Dutton and wife v. Pool	ii 27
gan	i 441		ii 564
Cowell v. Edwards	ii 187		
Cowley, assignee, &c.		E.	
v. Dunlop	ii 158	Eades v. Vandeput	i 224
Cowlin v. Cook	ii 421	Eaken v. Thom	i 380
Crantz v. Gill	i 166	East India Company v.	
Crifford v. Berry	ii 12	Hensley	i 241
Cripps v. Read	ii 64	—— v. Pullen	ii 330
Crosby v. Wadsworth	i 76	Eaton v. Sherwin	ii 531
Crow v. Rogers	i 28	Edgar assignee, &c. v.	
	ii 565	Fowler	ii 126
Cullen v. the Duke of		Edwards v. Harben	i 545
Queensbury	ii 356	—— v. Sherratt	ii 326
Curling v. Long	i 355	Egerton v. Matthews	i 108
Curry v. Edensor	i 142	Egles v. Vale	ii 206
	259	Eland v. Karr	ii 222
Curties v. Bridges	i 225	Elliot v. Edwards	ii 59
Curtis v. Vernon	i 545	Elliot, executor, &c. v.	
—— v. Hannay, Bart.	ii 282	Rogers	ii 515
		Ellis v. Mortimer	ii 215
D.		—— v. Turner	ii 328
Da Costa v. Jones	ii 490	Elsee v. Garward	i 365
Dale v. Hall	ii 321	Emerson v. Blonden	i 179
		Ethering-	

	Vol.	Page		Vol.	Page
Etherington v. Parrott	i	193	Garret v. Taylor	i	327
Evans v. Williams	i	339	Garfield v. The Proprietors		
— v. Brown	i	422	of the Trent and Mer-		
— v. Mann	i	432	sey Navigation Com-		
— v. Marlett	ii	319	pany	ii	292
Evelyn Bart. v. Chichester	i	158	Gibbon v. Paynton	ii	297
Ewers v. Hutton	i	190	Giles v. Edwards	ii	84
Exall v. Partridge	ii	152	Girarday v. Richardson	ii	522
Eyles v. Faikney	ii	203	Godfrey v. Turnbull	i	325
F.			Golden v. Manning	ii	303
Farrer v. Countess Dowager of Granard	i	183	Good v. Elliot	ii	489
— v. Nightingale	ii	58	Goodall v. Skelton	ii	231
Feife v. Randall	ii	443	Goodburn v. Marley	ii	504
Feltham v. Terry	ii	50, 558	Goode v. Jones	ii	22
Fenn v. Harrison	i	240	Gordon v. Martin	ii	401
Fenner v. Meares	ii	10	Govier v. Hancock	i	212
Fenton v. Emblers	i	88	Grace v. Smith	i	291
Ferguson's case	ii	530	Graham v. Hope	i	325
Fielder v. Starkin	ii	277	Grant v. Vaughan	ii	12
Finucane v. Small	ii	338	Gratland v. Freeman	i	220
Fish v. Hutchinson	i	68	Greenway v. Hurd	ii	25
Fisher v. Leslie	i	140	Gregory v. Badcock	ii	514
Fletcher v. Dyche	ii	539	Grimaldi v. White	ii	283
Flureau v. Thornhill	ii	53	Groome v. Potts	i	423
Ford v. Fothergill	i	157	Gunnis v. Erhart	ii	65
Fores v. Jones	ii	244	H.		
Forth v. Stanton	i	533	Hall v. Elliot	i	548
Forward v. Pittard	ii	291	Hands v. Slaney	i	155
Foster v. Thackery	ii	493	Hanson v. Roberdeau	i	256
— v. Scarlett	i	18	Harding v. Crethorn	ii	518
Foster's case	i	21	Hardress v. Prowd	ii	389
Foulke's v. Sellway	ii	415	Harman, assignee, &c.		
Foxcroft, assignee, &c.			v. Fishar	i	460
v. Devonshire	i	472	Harmer v. Killing	i	164
Furtado v. Rodgers	ii	98	Harris v. Morris	i	188
G			— v. Huntback	i	56
Gallini v. Laborie	ii	390	— v. Richards	ii	138, 150
Gardner v. Baillie	i	536	Harris's case	ii	422
Garforth v. Fearon	ii	452	Harrison v. Cage	i	20
Garment v. Barrs	ii	276	— v. Walker	ii	408
			Haffer v. Wallis	i	509
			Hatchett v. Baddeley	ii	43
			Harvey v. Gibbon	i	196
			Hazard v. Tredwell	i	28
			Hearn	i	219

	Vol.	Page
Hearn v. Tomlin	ii	522
Heathcote v. Crookshanks	ii	439
Hebden v. Rutter	i	15
Hecksher v. Gregory	ii	251
Hereford v. Powell	i	271
Hennell v. Fairlamb	ii	563
Hernaman v. Bawden	i	375
Hiccox v. Proud	ii	406
Hicks v. Hicks	ii	74
Hinde v. Whitehouse and Galan	i	120
Hiscox v. Greenwood	i	223
Hoare v. Dawes	i	295
Hogan v. Shee	ii	83
Hodge v. Vavisor	i	25
Hodges v. Hodges	i	189
Hogg v. Horner	ii	104
Holman v. Johnson	ii	239, 243
Holmer v. Viner	ii	437
Holmes v. Hall	ii	82
Holt v. Ward	ii	410
Hookin v. Quilter	ii	523
Hofkins v. Slayton	i	334
Hovil, assignee, &c. v. Browning	i	452
Hovill, assignee, &c. v. Pack	i	487
Houghton, assignee, &c. v. Mathews	i	268
Houlditch v. Milne	i	62
Houle v. Baxter	ii	157
Howard v. Baillie	i	538
—— v. Castle	ii	218
—— v. Hopkins	ii	547
Howes v. Martin	ii	154
Howson v. Hancock	ii	125
Hulle v. Heightman	i	371
Hunt v. Bate	i	20
—— v. Silk	ii	57
Hunter, assignee, &c. v. Potts	i	490
Huffey v. Fiddall	i	480
Hutton v. Mansell	ii	410
Hyde v. The Trent and Mersey Navigation Company	ii	305

I.

	Vol.	Page
Jacob v. Allen	i	522
Jackson v. Vernon	i	335
Jacques v. Golightly	ii	128
Jenkins v. Tucker	i	191
Jennings v. Rundall	i	150
—— v. Harley	ii	423
Jeffons v. Brooke	ii	116
Jeudwine v. Slade	ii	272
Innes v. Dunlop, Bart.	ii	508
Johnson v. Bann	ii	506
—— v. Johnson	ii	55
Jones v. Clark	i	24
—— v. Cooper	i	54
—— v. Brinley	ii	404
—— v. Randall	ii	497
Israel v. Douglas	ii	7
Irvin v. Wilson	ii	29

K.

Kannen v. McMullen	ii	372
Kaye v. Bolton	i	517
Keate v. Temple	i	57
Kellner v. Le Mcfuerier	ii	102
Kenrig v. Eggleston	ii	295
Kent v. Huskinson	i	108
Kerr v. Mountain	ii	393
King v. Boston	ii	363
——, assignee, &c. v. Leith	i	481
——, v. Scrape	ii	130
Kitchen v. Bartsch	i	423
Knibbs v. Hall	ii	42
Kretchman v. Beyer	i	433

L.

Lacauffade v. White	ii	123
Lacon v. Mertins	i	81
Lamine v. Dorrell	ii	558
Layfield's case	i	319
Leicester v. Rose	ii	443
Leigh v. Hewitt	ii	529
Leary		

	Vol	Page		Vol	Page
Leery v. Goodson	ii	21	Meyer v. Gregfon	ii	96
Le Sage v. Coufmaker	ii	405	Miller v. Aris	ii	33
Lewis v. Wallace	ii	523	Mitchell v. Reynolds	ii	467
Limland v. Stephens	i	370	Molloy v. Backer	i	364
Lindon v. Hooper	ii	51, 559	Moore v. Mourgue	i	264
Linton v. Bartlett	i	455	— v. Wilson	ii	316
Long v. Allen	ii	97	Morck v. Abel	ii	108
Longchamp v. Kenry	ii	18	Morris v. Martin	i	211
Lorraine v. Thomlinfon	ii	92	Mors v. Slue	ii	320
Love's cafe	ii	433	Moses v. Macferlan	ii	46
Lowe v. Peers	ii	412	Munt v. Stokes	ii	110
		538	Muffell v. Cooke	i	90
Loyd v. Lee	ii	431	Muffen v. Price	ii	224
Luke v. Lyde	i	319	Myrtle v. Beaver	i	279
Lutterloh v. Halfey	i	278	Mytton v. Cock	ii	346
Lutwidge v. Grey	i	344, 347			

M.

Mackbeath v. Haldimand	i	272
Mackenzie v. Banks	i	145
— v. Scott	i	254
Mackrell v. Simond	i	356
Main v. Melbourn	i	82
Male v. Roberts	i	161
Manby v. Scott	i	193
Manning v. Livie	i	135
March, Earl of, v. Pigot	ii	487
Marriot v. Hampton	ii	44
Marth and Rainsford's cafe	ii	417
Marshall v. Rutton	i	175
Martin, assignee, &c. v. Pewtrefts	i	459
— v. Court	ii	183
— v. Sitwell	ii	87
Martyn v. Blithman	ii	435
Massiter v. Cooper	ii	393
Matfon v. Wharam	i	54
McNamara and wife v. Fisher	i	183
McNeil v. Perchard	ii	30
Medina v. Stoughton	ii	263
Mellish v. Motteux	ii	273
Menetone v. Athawes	i	331
Meredith v. Chute	ii	448
Mertens v. Adcock	ii	220
Merryweather v. Nixon	ii	190
Mefnard v. Aldridge	ii	280

N.

Naish v. Tatlock	i	493
Nerot v. Wallace	i	28, 515
Newby v. Wiltshire	i	230
Newdigate v. Davy	ii	50
Nichols v. Raynbred	i	15
Nicholson v. Willan	ii	299
Nickfon v. Brohan	i	245
Nightingale, assignee, v. Devisme	ii	20
Norman v. Cole	ii	127, 403
Norris v. Napper	ii	29
Norton v. Fazan	i	213
Nurse v. Craig	i	199

O.

Orr v. Churchill	ii	545
Osborne v. The Governors of Guy's Hospital	ii	406
Owen v. Gooch	i	249
Oxford, St. John's Col- lege, v. Murcott	ii	31

P.

Packhurst v. Smith	ii	534
Padget v. Priest	i	543
		Parke

INDEX OF CASES CITED.

xvii

	Vol.	Page
Parke v. Eliafon	i	503
Parker v. Baylis	i	534
—— v. Brown	ii	466
Parkinson v. Lee	ii	267
Parflow v. Dearlove	i	412
Parsons v. Thompson	ii	458
Partridge v. Sowerby	ii	527
Paul v. Jones	i	415
Payne v. Whale	ii	77
—— v. Cave	ii	217
Pearce v. Rogers	i	222
Pearle v. Unger	i	23
Peck v. Wood	ii	196
Penson v. Lee	ii	87
Pepper v. Burland	ii	360
Peter v. Compton	i	87
Phillipton v. Leigh	ii	528
Philpott v. Waller	i	72
Pickard v. Bonner	ii	112
Pickering v. Appleby	i	89
—— v. Barclay	ii	325
Pierfon v. Dunlop	ii	15
Pine v. Morris	ii	565
Pinkerton, assignee, &c.		
v. Marshall	i	440
Pitt v. Yalden	ii	386
Pleafe v. Paltry	i	5
Plymouth, Countess of,		
v. Throgmorton	i	229
Pond v. Underwood	i	523
Pope v. St. Leger	ii	506
Poulter v. Killingbeck	i	75
—— v. Cornwall	ii	5
Powell v. Millbank	ii	134
Power v. Wells	ii	77
Powley v. Walker	ii	529
Precious v. Abel	i	220
Price v. Neale	ii	35
Pyke v. Williams	i	81

Q.

Queensbury, Duke of, v.	
Cullen, <i>in error</i> ,	i 7

R.

	Vol.	Page
Rann v. Hughes	i	10, 49
Rawlinson v. Shaw	i	539
Rawlyns v. Vandyke	i	194
Read v. Nash	i	60
Read's case	i	542
Redpath v. Roberts	ii	521
Reed v. Meftaer	ii	229
Ribbans v. Crickett	ii	356
Rice v. Chute	i	282
—— v. Everitt	i	284
Rich v. Cox	i	332
Richards v. Borrett	ii	72
—— v. Barton	ii	286
Robinson v. Bland	ii	144
—— v. Anderton	ii	65
—— v. Hendman	i	230
—— v. Dunmore	ii	336
Robison v. Gofnold	i	187
Robson v. Hall	i	140
Roe v. Haugh	ii	449
Rogers v. Reeves	ii	435
Rolf v. Peterson	ii	538
Rondeau v. Wyatt	i	93, 99
Rothwell v. Humphreys	i	318
—— v. Cooke	ii	89
Rucker v. Cammeyer	i	127
Rusby v. Scarlett	i	222
Ruffel v. Palmer	ii	384
Ruffell v. Hankey	i	265
—— v. Ruffell	i	80
Rutter v. Hebden	ii	408

S.

Sanders v. Kentishi	ii	260
Sangster v. Birkhead	ii	200
Sandhill v. Jenny	ii	417
Saunderson v. Jackson	i	116
Scarman v. Castell	i	231
Scott v. Surman	i	496
Scurlfield v. Gowland	ii	70
Seagood v. Meale and		
Leonard	i	109
Searle v. Keeses	i	96
Secar		

	Vol. Page		Vol. Page
Tubb v. Harrison	i 167	Welford v. Beazley	i 111
Turner v. Baynes	i 395	Wells v. Mafterman	i 310
—— v. Phillips	ii 86	Wennall v. Adney	i 232
—— v. Davies	ii 189	Weston v. Downes	ii 76
Turrell v. Collett	i 169	Wettenhall v. Wood	ii 148
Tuson v. Batting	ii 370	Whaley v. Bagnel or	
Tyley v. Sir Joseph Mor-		Bagenal	i 86
rice	ii 296	Whaley v. Pajot	ii 502
Tyrie v. Fletcher	ii 90	Whalley v. Wray	ii 327
		White v. Boulton	ii 393
V.		Whitfield v. Savage	ii 15
Vale v. Bayle	ii 232	Whittingham v. Hill	i 148
Vandeyck v. Hewitt	ii 107	Whitwell v. Bennet	ii 17
Vere v. Lewis	ii 14	Whywall v. Champion	i 149
Vernon assignee, &c. v.		Wilkins assignee, &c. v.	
Hall	i 438	Casby	i 437
—— v. Hankey	i 485	Wilkinson v. Frazier	i 393
—— v. Hanson	i 485	Willet v. Chambers	i 320
Virany v. Warne	ii 388	Williams v. Brown	i 372
Upsdell v. Stewart	ii 369	—— v. Dyde	i 427
		—— v. Harrison	i 149
		—— v. Millington,	i 254
		—— v. Leper	i 61
W.			ii 434
Waddington v. Briflow	i 143	Winbled v. Malmberg	i 138
—— v. Oliver	ii 223	Winch v. Keeley	i 420
Wain v. Warlters	i 103	Winkworth v. Mills	i 69
Walford v. the Dutchess		Winn v. White	ii 530
De Picenne	i 181	Wyatt v. the Marquis of	
Walker v. Chapman	ii 113	Hertford	i 246
Warcop v. Morfe	i 24		
Ward v. Evans	i 244	X.	
	ii 6	Ximenes v. Jaques	i 137
Waters v. Glassop	ii 421		ii 502
Watson v. Theikeld	i 215		
—— v. Turner	i 397	Y.	
Waugh v. Carver	i 286		
Wayland's Sir Robert,		Yarker v. Botham	i 513
cafe	i 219	Yate v. Willan	ii 302
Waymell v. Reed	ii 242	Young v. Artell	i 293
Webb's cafe	ii 402	—— v. Hockley	i 414
Weddell v. Lynam	ii 71		

ERRATA:

IN VOLUME FIRST.

- Page 45, line 27, for "is" read "are."
 53, l. 21, for "a man" read "the man."
 59, l. 25, after the word "any" read "new."
 67, l. 31, for "Statute" read "Statute."
 90, l. 2 from the bottom, dele "or."
 115, l. 14, for "flowed" read "flown."
 164, l. 10 from the bottom, after "minority" read "when he is able."
 186, l. 16, after the word "the" read "safe."
 226, bottom line, for "18" read "1."
 243, bottom line, after "It." read "360."
 276, l. 29, after "ground," read "of."
 287, l. 23, instead of "batb," read "dath."
 288, l. 12, instead of "as" read "or."
 290, l. 17, instead of "intitle" read "entitle."
 336, line 8 from the bottom, for "rensonable" read "reasonably."
 343, last line, for "and" read "to."
 351, last line but one, after the word "was" read "burnt."
 361, l. 10, dele "But."
 375, l. 6, after "be" add "so."
 379, l. 15, after "but" read "must;" and dele "must," after "have."
 410, l. 11, after the word "to" read "be."
 414, l. 7 from the bottom, after "accepted," read "for the accommodation of the defendant."

IN VOLUME SECOND.

- Page 23, line 2 from the bottom, instead of "loose" read "to lose."
 30, l. 17, after "an," read, "action of."
 40, l. 9 from the bottom, after "learned" read "judge."
 41, last line, dele "in his own wrong."
 87, l. 7, after "Return," read "of."
 130, l. 4 from the bottom, for "here" read "there."
 144, l. 20, for "Alimbbrook" read "Alcinbrook."
 158, l. 20, dele "and," and read "which were."
 186, l. 24, for "whole," read "old."
 256, l. 2 from the bottom, after the word "in" dele "the."
 6 from the bottom, for "principal" read "original."
 353, l. 5, instead of "in" read "to a."
 354, l. 14, dele "a."
 504, l. 10 from the bottom, for "are" read "is."

THE LAW OF CONTRACTS.

PART THE FIRST. OF THE NATURE AND REQUISITES OF A CONTRACT AND AGREEMENT BY PAROL.

CHAPTER I.

*Of the Nature of a Contract and Agreement by Parol; and
of Express and Implied Contracts and Promises.*

ALL Contracts are by the laws of *England* distinguished into agreements by *specialty*, and agreements by *parol*. If they be merely written, and not under seal, they are denominated contracts by parol (a).

As Contracts and Agreements between Merchants and others are most commonly entered into either verbally, or in writing without seal, the present work is wholly confined to contracts and agreements usually denominated *parol*; and these alone, it may be observed, are the subject matter of the action of *assumpsit*.

(a) Per Ld. Ch. Baron *Skymer*, in the case of *Rams v. Hughes*,
7 Term Rep. 350, n. 2.

Now a contract by *parol* is defined to be a bargain or agreement voluntarily made, either verbally, or in writing not under seal, upon a good consideration, between two or more persons capable of contracting, to do or forbear to do some lawful act; as if a man sells or exchanges cattle or goods for money or any other commodity; or agrees in consideration of a sum of money to make a lease of lands, or forbear to prosecute a legal claim, &c. (b) And these are valid contracts, because there is, what lawyers commonly term, *quid pro quo*, or one thing for another. But, if a man, without any consideration than mere good will, or natural affection, make a voluntary promise to give to another a sum of money, as for instance, 20*l.* and that he will be his debtor for that sum; this is no contract, but a mere naked promise or *nudum pactum*: for, however a man may or may not be bound to perform such a promise, in honour or conscience, which the municipal laws of this country do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the *pact* or promise from being *nude*; and therefore, in the instance put, if any thing, however trifling, were done, or to be done or given for the 20*l.*, it would be a valid contract, and binding upon the parties (c).

The definition of an agreement is thus given in our law books: "An agreement is, *aggregatio mentium*, viz. when two or more minds are united in a thing done or to be done, or where a mutual assent is given to do or not to do a particular act (d)." And it is observed, (e) that every contract and agreement ought to be so certain and complete that each party may have an action or other remedy upon it.

Now in order to render a contract or agreement certain and complete, six things appear necessary to concur; 1. A person able to contract; 2. A person capable to be contracted with; 3. A thing to be contracted for; 4. A good and sufficient consideration

(b) Note, a bond, or other instrument in writing under seal, is termed a contract by *specialty*.

(c) Vide *Termes de Ley*, tit. Contract. Bro. Abr. tit. Contract. pl. 34. Pl. Com. 302. 2 Bl. Com. 445.

(d) Com. Dig. tit. Agreement. A. 1. Pl. Com. 5, 17. 5 East, 16.

(e) Pl. Com. 5.

or *quid pro quo*; 5. Clear and explicit words to express the contract or agreement; 6. The assent of both the contracting parties (*f*). So, every contract should be obligatory on both the contracting parties, or both should be at liberty to recede therefrom (*g*). But to an agreement or contract, there is not any prescribed form of words; but any words which show the assent of the parties are sufficient (*h*).

A contract or agreement conveys an interest either in *possession*, or in *action*; as if A. agrees to change horses with B., and they do it immediately; or if goods are sold and delivered and paid for at one time; here the possession and the right are transferred together; and such contract or agreement being executed and complete, is commonly termed an *executed* contract. But where A. for a valuable consideration contracts with B. to pay him 100*l.* at a day to come; in this case, though A. thereby transfers a property or interest in such sum to B. yet such property or interest is not in *possession*, but in *action* merely, and recoverable by suit at law; and the contract not being performed, is therefore usually denominated an *executory* contract (*i*).

Of Express Contracts or Promises.

Contracts and agreements without seal are either expressed or implied. *Express* contracts are where the terms of the bargain, agreement, or promise, are openly uttered and expressed by the contracting parties themselves. The subject matter of this class of contracts relates either to the person or property of the contractors, and may be either to do or forbear to do a particular act; as, to pay money on the sale or exchange of cattle or goods; to pay rent for the use and occupation of lands or houses; to pay money on particular mercantile securities or agreements; to pay the debt of a third person; to pay money won or lost at play; to perform works; to accept, deliver, or take back goods, &c.; to accept, transfer, or replace stock; to let or take lands or houses; to warrant the title to lands; to warrant the soundness or quality of

(*f*) *Vide* Pl. Com. 161. Co. Lit. 35. (*h*).

(*g*) 3 Term Rep. 653.

(*h*) Pl. Com. 140.

(*i*) 2 Bl. Com. 443.

cattle or goods; to indemnify; to marry; to forbear to sue; not to trade within a particular distance, &c.

Express contracts or promises ought to be certain and explicit; but certainty to a common intent is sufficient (*b*): as if a man promises another, in consideration that he will assign to him a certain term, to pay him 10*l*. this is a good *assumpsit*, though the time of the assignment and the payment be not appointed; for the 10*l*. shall be paid in a convenient or reasonable time after the assignment, which also must be made within a reasonable time after the agreement (*l*).

So, if A. be indebted to B. for certain things to him sold, and C. comes to B. and, for a good consideration, promises him, that if A. should not pay him the money, he will pay it for him; an action upon the case lies for B. against C. upon this promise, if A. does not pay the money within a convenient or reasonable time; for so shall the promise be taken, *viz.* that if A. does not pay it in a convenient time, that then C. will pay it for him (*m*).

So, where A., in consideration that B. would marry his daughter, promised to give with her a child's part; and that, at the time of his death, he would give to her as much as to any of his children, except his eldest son; this was holden to be a good promise: for though a child's part is in itself altogether uncertain, yet, it being shown what the rest of the children had, except the eldest, it is then reduced to a sufficient certainty (*n*).

But if a citizen of *London* promises a child's portion, this of itself is certain enough; for by the custom there it is known how much each child shall have (*o*).

So, an *assumpsit* to give a bond for 40*l*. without saying in what penalty, is good; for it shall be intended double the sum (*p*).

But, where the plaintiff declared that, whereas there was a communication between him and the defendant concerning the bark of certain wood, and that thereupon it was agreed, that the

(*b*) Com. Dig. tit. Action of *Assumpsit*, A. 3. 4.

(*l*) 1 Rol. Abr. 14. l. 50.

(*m*) 1 Rol. Abr. 15. l. 5.

(*n*) *Silvester's case*, Poph. 148. 2 Rol. Rep. 104. S. C.

(*o*) *Pet Montagu*, Ch. Just. 2 Rol. Rep. 104.

(*p*) 1 Lev. 38.

defendant

defendant should give to the plaintiff two shillings *per* seam for all the bark of such wood as the plaintiff should cut; and that the defendant assumed and promised to have ready upon a certain day articles in writing purporting that agreement, and an obligation for performance thereof, &c., the declaration was holden not to be good; because it was not said in what sum the obligation was to be, and a certain sum could not be intended, because the number of seams were altogether uncertain (q).

No express contract or agreement can be raised from a mere casual speaking or declaration in discourse; as, if there be a discourse between the father of A. and B. in relation to a marriage between A. and the daughter of B.; and B. in that discourse declares and publishes to the father of A. *that he would give to him who should marry his daughter with his consent 100l.* and A. after this declaration marries the daughter of B. with his consent; yet it was holden, that this declaration and publication of B. shall raise no promise upon which an action of *assumpsit* may be brought; for these general words do not include any promise; and the agreement must be complete upon which an express *assumpsit* lies (r).

Of Implied Contracts or Promises.

Implied contracts or promises are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As, if a person is employed by another to do any business for him, or perform any work, and nothing is agreed upon as to the price of his labour, the law implies that the employer undertook or contracted to pay the person so employed as much as he reasonably deserves for his labour. So, where a man orders goods of a tradesman without any agreement of price, the law concludes that the buyer contracted to pay to the seller their real value (s).

From hence it may be collected that all implied contracts or promises are founded on some legal liability to pay a debt, or perform

(q) *Please v. Palfrey*, 1 Sid. 270. 1 Keb. 776. S. C.
 (r) 1 Rol. Abr. 6. l. 40. 1 Dan. Abr. 26. Com. Dig. tit. Action of *Assumpsit*, F. 2. *yet* 17—
 (s) 2 Bl. Com. 443. But see Ld. Raym. 538. 6 Mod. 259.

a duty. Therefore, besides the instances just mentioned, when money is lent and advanced, paid, laid out, and expended, or had and received; and nothing is expressly stipulated by the parties, as to the repayment thereof, the law raises an *implied* promise that it shall be repaid upon request. So, when money is due on an account stated; or for fines on admissions into copyhold premises for fines and duties payable to corporations; for fees payable to particular officers; for petty customs and tolls; for general average; for the salvage of ship or goods; for the carriage or wharfage of goods, for money due on awards, or foreign judgments: So also, as between landlord and tenant, that the latter shall use his farm, &c. in a husband-like and proper manner. In these instances also, and various others which might be mentioned, though no express agreement be made, a legal liability arises; and the law presumes that the party promised to pay the debt, or perform the duty.

The last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by action. A few instances will fully illustrate this matter. If a surgeon, attorney, or any other professional person is guilty of neglect of duty, or a palpable breach of it, he is liable to an action on an implied *assumpsit* or promise for a reparation in damages for the injury sustained in consequence of such neglect. There is also in law always an *implied* contract with a common inn-keeper, common carrier, wharfinger, warehouse-keeper, or other bailee to be answerable for the goods entrusted to their care; with a common farrier that he shoes a horse well without laming him; with builders and other workmen that they perform their business in a workmanlike manner; in which if they fail, an action on the case either in *tort* or *assumpsit* lies to recover damages for such breach of their general undertaking. But if a person is employed to transact any of these concerns whose common profession and business it is not, the law implies no such *general* undertaking; but in order to charge him with damages an *express* agreement is required (1).

(1) Vide 3 BL. Com. 165.

It is difficult to state with certainty what contracts and promises are exclusively implied ; though, as a general rule, it may be observed, that promises in law only exist where there is no express stipulation between the parties (u).

Who may contract, &c.

The parties to a contract are two or more, namely, the person or persons who contract the obligation to do or forbear to do a particular act, and the person or persons in whose favour it is contracted.

Generally speaking, all persons, except infants and married women, having capacity and understanding, may, by mutual assent, become parties to a contract, and bind themselves and their personal representatives to a performance thereof (v). In some cases indeed, as will be shown in a subsequent part of this work, infants and married women may legally enter into a contract.

Contracts and agreements are entered into by individuals either for themselves or third persons ; and the liability of the parties thereto must wholly depend upon the general nature and terms of the contract. Thus, where A. B. and C. on behalf of themselves and other members of a club, entered into articles of agreement with D. to provide necessaries for the use and accommodation of the club ; it was holden that the three were personally bound by such articles ; and that D. was not obliged to resort to any of the other members for satisfaction of his demands (w).

In this chapter, however, it is not necessary to dwell further on these points, as they will come under a more distinct and particular consideration in the second part of this work.

(u) *Per Buller*, Just. 2 Term Rep. 105.

(v) Vide 1 Bac. Abr. tit. Agreements. A.

(w) *Duke of Queensbury and others v. Cullen*, 1 Bro. Parl. Caf. 396.

2vo ed.

CHAPTER II.

Of the Consideration necessary to support a Contract or Agreement.

IT is essential to every contract or agreement that it be founded upon a good consideration.

The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void.

A contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor, as any other person (a).

These considerations are said (b) to be divided by the civilians into four species. 1. *Do, ut des*: as when I give money or goods on a contract, that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*: as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both

(a) 2 Bl. Com. 444.

(b) *Ibid.* See also Treat. of Eq. b. 1. c. 5. s. 1. n. 2.

sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A. will not trade to *Lisbon*, B. will not trade to *Marseilles*; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des*: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value on it. And when a servant hires himself to his master for certain wages, or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an *implied contract* to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a servant, to give him such wages upon his performing such work: which, we see is nothing else but the last species inverted: for *servus facit, ut herus det*, and, *herus dat, ut servus faciat*.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it (c).

But it is observed, (d) as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such a promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

(c) 1 Bl. Com. 445.

(d) *Ibid.*

This observation, as far as it respects promissory notes, and other written contracts not under seal, is certainly supported by the opinion of Mr. Justice *Wilmot*, in the case of *Pillans v. Van Mierop* (e), who said, "I cannot find that a *nudum pactum* evidenced by writing has been ever holden bad: and I should think it good; though where it is merely *verbal*, it is bad. Yet I give no opinion upon its being good, always, when in writing."

The law, however, on this point is now settled; and the rule is, that a verbal agreement, or promise, though reduced into writing, is not valid, unless a consideration be proved.

Thus, in the case of *Rann* and another, executors of *Mary Hughes*, v. *Isabella Hughes*, administratrix of *J. Hughes*, in error (f), the declaration stated, that on the 11th June 1764, divers disputes had arisen between the plaintiff's testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiff's testator 983*l.* That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the said sum of 983*l.* was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay, &c."

The defendant pleaded *non assumpsit*; *plene administravit*; and *plene administravit*, except as to certain goods, &c. which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth, &c. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first, a general judgment was entered in the Court of *King's Bench* against the defendant *de bonis propriis*. This judgment was reversed in the *Exchequer* chamber; and a writ of error was afterwards brought in the *House of Lords*, where, after argument, the following question was proposed to the Judges by the Lord Chancellor; "Whether sufficient matter appeared upon the

(e) ; Bur. 1671.

(f) 7 Term Rep. 350. n. a. Dom. Proc. 14 May 1778.

" declaration

“ declaration to warrant after verdict the judgment against the defendant in error in her personal capacity ?” Upon which the Lord Chief Baron *Stymer* delivered the opinion of the Judges to this effect.—“ It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy to compel the performance of an agreement made without sufficient consideration ; such agreement is *nudum pactum ex quo non oritur actio* ; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix, promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be coextensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right : but here no sufficient consideration occurs to support this demand against her in her personal capacity ; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request, what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing ; and that after verdict, if it were necessary to support the promise that it should be in writing, it will, after verdict, be presumed that it was in writing : and this last is certainly true ; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of *England*.” His Lordship observed upon the doctrine of *nudum pactum* delivered by Mr. J. *Wilmot* in the case of *Pillans v. Van Mierop*, 3 Burr. 1663, “ that he contradicted himself, and was also contradicted by *Vinnius*, in his comment on *Justinian*.” All contracts are by the laws of *England* distinguished into agreements by specialty, and agreements by

by parol; nor is there any such third class, as some of the Counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed, that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But, said his Lordship, this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon the case of *Pillans v. Van Mierop*, in Burrow, and the case of *Loth v. Williamson*, Mich. 16 G. 3. in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said, "that all his Brothers concurred with him, that in this case there was not a sufficient consideration to support this demand, as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is, that the question put to us must be answered in the negative."

The same rule also applies to promissory notes and bills of exchange, as well as to all other contracts in writing without seal. This rule, however, extends only to the immediate parties to a bill or note, and does not affect third persons, who happen to be strangers to the want of consideration as between those parties. For instance, if an action be brought upon a note or bill, at the suit of the payee against the drawer, or, by the indorsee against the indorser, for which no consideration was given, the plaintiff, in either case, cannot recover.

But the want of consideration, as between the maker and payee of a note or bill, cannot be set up in an action against either of them at the suit of an indorsee, unless it be proved, that he was acquainted

quainted with this circumstance at the time of taking the note or bill (g).

The reason why third persons ought not to be affected by this rule is, that bills and notes being negotiable instruments, by mere indorsement and delivery, it would be enabling the original parties to assist in a fraud, if they were to be allowed to set up the want of consideration, as between themselves, in bar to an action against either of them, at the suit of an indorsee for a valuable consideration.

Lord *Mansfield* is reported (h) to have said that "in commercial cases amongst merchants, the want of consideration is not an objection." But this observation, it is apprehended, must be understood to apply only to cases of bills and notes when in the hands of an indorsee. For in all other contracts and agreements, not under seal, whether mercantile or otherwise, a consideration is absolutely necessary. Indeed, a bargain without a consideration is said to be a contradiction in terms, and cannot exist (i).

I now proceed to show what consideration is necessary to support a contract or agreement.

It is a known rule of law, that to make a contract or agreement obligatory the consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; otherwise the contract or agreement is considered as *nudum pactum*, and cannot be enforced (k).

Thus, a promise in consideration of the forbearance of a suit for a certain time, is good; for that is for the benefit of the defendant, though the action is not discharged (l). But, a promise in consideration of forbearance is not valid where there was originally no cause of action; as, in consideration of forbearance of a suit upon a con-

(g) Vide 7 Mod. 13. Stra. 674. 2 Term Rep. 71. 1 Esp. Rep. 117. 261. Bayley on Bills, 121, 2 Ed. Chitty on Bills, 9. 51. Fonbl. Treat. of Eq. 1 V. 343. 2 Ed.

(h) 3 Bur. 1669.

(i) Per Lord *Loughborough*, in the case of *Middleton v. Ld. Kenyon*, 2 Ves. jun. 408.

(k) Com. Dig. tit. Action on the case upon *Assumpsit*, B. 1.

(l) Vide Cro. El. 387. 643, 4. 768. 848. vide *post*, Part III.

tract made by a married woman (m). A promise *in consideration of surceasing of a suit is good*; for that is a benefit to the defendant, and a prejudice to the plaintiff, though the action is not discharged (n).

So, in consideration of the discharge of a debt, or the delivery of a bond, or other security (o).

So, *in consideration of the proof of a debt*, for it is a charge to the plaintiff; as, if an executor promise, in consideration of the proof of the delivery of goods to his testator, to pay for them (p). So, if the parties agree to a particular manner of trial of the validity of a debt, it shall be determined in such manner (q).

So, *in consideration of any particular service or labour by the party to whom the promise is made*; as, to procure the enjoyment of a house; (r) or to procure a note, &c. from the debtor of the party promising (s).

Or, in consideration that the plaintiff would act for the defendant as a commissioner to examine witnesses (t).

So, *in consideration of permission given to do an act*; as, to permit a wife to take out administration *durante minori etate* of her son; for it does not belong to her (v).

So, in consideration of leave of absence from a regiment for a reasonable time (x).

So, *in consideration of any other act, by which the defendant has benefit*; as, in consideration that the plaintiff would deliver to the defendant certain goods, in which the plaintiff had only a special property; for the defendant has a benefit by the present possession (y).

So, in consideration of the release of an equity of redemption (z).

So, a promise in consideration of the assignment of an uncertain debt (a).

So, a promise to accept a bill in consideration of the acceptance of another of equal amount (b).

(m) Stra. 94.

(n) Hob. 216. 1 Rol. Abr. 19. l. 20. 30. 2 Bulst. 41. Pal. 394.

(o) Com. Dig. tit. Action upon *Assumpsit*, B. 3.

(p) 1 Leon. 93. 1 Sid. 57. 369. T. Ray. 32. 153. Cro. El. 67.

(q) 3 Lev. 241. (r) Yelv. 11. (s) 2 Vent. 71. 74.

(t) Show. 342. (v) 1 Rol. Abr. 21. l. 30. (x) 1 Ld. Raym. 312.

(y) Cro. El. 218. *Vide* Yelv. 4. 50. 128. (z) Ld. Raym. 662.

(a) 2 Bl. Rep. 820. (b) 7 Term Rep. 569. 2 H. Bl. 570.

*mut. acc.
2 Wils. 177.*

So, in *consideration of marriage*; as, upon a communication of a marriage, a cousin of the husband promises the wife to give her 100*l.* if the husband's father does not assure such land (*c*).

So, a discharge of a promise of marriage by a woman to a man is a good consideration (*d*).

So, in *consideration of the voluntary performance of an act, which the plaintiff was compellable to perform*; as, if the plaintiff will discharge a debt, for which he and the defendant are sureties, the defendant will repay the moiety (*e*).

So, a promise to cancel a bond in consideration that the obligee will pay the single sum due upon it (*f*).

Of Mutual Promises.

A promise for promise is a good consideration; as in consideration of a reciprocal promise of marriage.

Thus, in the case of *Hebden v. Rutter* (*g*), the plaintiff declared, that in consideration that she promised to marry the defendant, the defendant promised to marry the plaintiff: and averred that the plaintiff requested the defendant to marry, but the defendant refused, &c. And to this declaration the defendant demurred. And it was said, that there was not any consideration; for marriage is a matter merely spiritual, and no ground for *assumpsit* at common law. *Sed per Curiam*, "the declaration and consideration in this case are good; for marriage is a preferment, and the loss of it is a temporal loss."

So, where one *Nichols* brought an action of *assumpsit* against *Raynbred*, declaring that in consideration, that *Nichols* promised to deliver to *Raynbred* a cow, *Raynbred* promised to deliver him 50*s.* This was adjudged a sufficient consideration, it being promise for promise (*h*).

It is observed that mutual promises must be made at the same time; otherwise they will be *nuda pacta* (*i*).

(*c*) Cro. El. 613, 4. Het. 50.

(*d*) 1 Rol. Abr. 470. l. 5. Sty. 295. 303. T. Raym. 400.

(*e*) 1 Rol. Abr. 20. l. 50. (*f*) Cro. Car. 8. Hutt. 76. Cro. El. 194.

(*g*) 1 Sid. 180. See also 1 Rol. Abr. 22. l. 5. 1 Lev. 147. Cart. 235. Mod. Caf. 155. 1 Salk. 24. 5 Mod. 411. Ld. Raym. 386. S. P.

(*h*) Hob. 88. See also Cro. El. 543. 703. 4 Leon. 3. Yelv. 134. 1 Wils. 88. S. P. (*i*) Hob. 88.

We have before (k) seen that a consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to pay any thing on one side, without any compensation on the other, is actually void in law and a man cannot legally be compelled to perform it.

Therefore, if a man *gratuitously*, or in consideration of *natural affection*, or of *friendship*, promises another to give him a sum of money on a day to come, this is *nudum pactum*, and cannot be enforced at law. For though a gratuitous undertaking, seriously made, is certainly sufficient, to form the basis of a moral and honorary obligation, and ought not to be receded from without some adequate reason; yet, in general, a person making such a promise does not thereby intend to subject himself to legal responsibility and the object of the law is rather to give effect to contracts founded upon the mutual exigencies of society, than to compel the execution of a voluntary engagement of mere donation.

So, if one buy goods for money, and no money be paid, nor earnest given, nor day set for payment, nor the goods, or any part of them, delivered; here no action lies for the money, or the goods sold, but the owner may sell them to another if he will; there being no consideration, but a mere agreement to buy (l).

Cooke v. Oxley

16 East

1 M & S

So, where A. having proposed to sell goods (m) to B. gave him a certain time at his request to determine whether he would buy them or not; B. within the time determined to buy them, and gave notice thereof to A.; yet it was holden that A. was not liable to an action for not delivering them, for B. not being bound by the original contract, there was no consideration to bind A.

So, where a carpenter had undertaken to build an house, and for the not doing it, the party brought an action against the carpenter, but because it did not appear that he was to have any thing for building the house; it was adjudged that the action would not lie (n).

It is stated in p. 5 that the law would save in which of any trouble or prejudice to the party to whom the promise is made, it is not good: as if a promise be made by an executor, or an heir at law, no action was agreed upon.

(k) Ante, 9.

(l) Dy. 30. a. Bro. tit. Contract. Shep. Touch. 224.

(m) 3 Term Rep. 653.

(n) 1 Rol. Abr. 9. l. 40. Pl. Com. 309. See also 3 Ld. Raym. 919.

3 Term Rep. 143. 149.

law,

law who has no assets, in consideration of forbearance, to pay the debt of the testator (a).

So, if an heir promise in consideration of the forbearance of a suit in *Chancery*, to which he was not liable (p).

So, if a man promise payment to an assignee, in consideration that he will accept him for his debtor (q).

So, in consideration of relinquishing an *assumpsit*, which was void; (r) or, in consideration of a discharge from a tortious arrest (x).

So, if a woman after the death of her husband promise, in consideration that the plaintiff, a creditor of her late husband, will permit her to take out administration to her husband, she will pay him his debt; this is not a valid consideration; for the administration belongs to the wife (t).

So, in consideration of a lease at will, for he may determine it at his pleasure (v).

But if there be any benefit, labour, or prejudice, however trifling, it is deemed a sufficient consideration.

Thus, in the case of *Sir Anthony Sturlyn v. Albany* (u), the plaintiff had made a lease to J. S. of land for life rendering rent; J. S. granted all his estate to the defendant; the rent was behind for several years; the plaintiff demanded the rent of the defendant, who promised, that if the plaintiff could show to him a deed that the rent was due, he would pay to him the rent and arrearages: the plaintiff alleged that on such a day, &c. he showed the defendant the indenture of lease by which the rent was due; but notwithstanding this, the defendant refused to pay the rent and arrearages due for four years; and for the recovery thereof, the action was brought. A motion was made in arrest of judgment, that there was no consideration to ground an *assumpsit*; for the mere showing of the deed is no consideration in law. But the court gave judgment for the plaintiff upon this ground, that when a thing is to be done by the party to whom the promise is made, be it never so small, this is a sufficient consideration to support an action; and here the showing of the deed was to

(a) Mo. 782. 3. 1 Rol. Abr. 28. l. 35.

(p) Cro. El. 206.

(q) 1 Saund. 210. (r) 1 Rol. Abr. 26. l. 10. (s) Yelv. 25, 6.

(t) Mo. 685. 1 Leon. 240. (v) 1 Rol. Abr. 23. l. 37.

(u) Cro. El. 67. 150.

avoid a suit.—The Reporter makes the following note: “In this case it was alleged, that it had been adjudged, when one assueth to another, that if he can show him an obligation in which he was bound to him, that he would pay him, and he did show the obligation, &c. that no action lieth upon this *assumpsit*; which was affirmed by the justices.”

So, in *Foster v. Scarlett* (y), the plaintiff declared, that whereas he and one *Willington* submitted themselves to the arbitrament of A. and B. of all matters, &c.; that A and B. awarded the plaintiff should release to *Willington* all debts which he owed him; and that *Willington* should assure to the plaintiff certain lands which he held for life, the reversion to the plaintiff; and that the defendant and one *Putter*, who pretended to have a lease of the lands, should seal a deed to the plaintiff, that they should assure to the plaintiff their lease and interest in the said lands: that after the arbitrament, in consideration that the plaintiff did assume to *Willington* to stand to and perform the arbitrament, the defendant did assume, that he and *Putter*, upon a request made to them, would convey the said land to the plaintiff: the plaintiff averred that he had performed the award on his part, and had requested the defendant that he and *Putter* would convey the land, &c. which they had not done.—It was moved in arrest of judgment that there was no consideration to bind the defendant, for he took no benefit thereby. But the Court held clearly the contrary, that it was a good consideration; for by reason of the promise the plaintiff was drawn to make the release, and it is not material that the defendant took no benefit by the release.

So, the common law, in some cases, considers the mere entrusting a thing with another, and his undertaking the care of it, a sufficient consideration for his faithful discharge of the trust. And therefore, though a person who gratuitously engages to do an act for another, is not liable in law to an action for not doing it; yet if goods are delivered to him, and he undertakes to carry them, or do something about them without any reward, an action of *assumpsit* will lie on this bailment, if there be any neglect on the part of the bailee by which the goods are spoiled.

This was one of the points settled in the case of *Coggs v. Bernard*, (z) which was an action of *assumpsit*, wherein the plaintiff declared, that, whereas the defendant undertook safely and securely to take up several hogshheads of brandy, then in a certain cellar in D. and safely and securely to lay them down again in a certain other cellar in W. but that the said defendant and his servants so negligently and improvidently put them down again into the said other cellar, that for want of care in the defendant and his servants, one of the casks was staved, and a great quantity of brandy was lost. A motion was made in arrest of judgment, because it was not alleged, in the declaration, that the defendant was a common-porter, nor averred that he had any thing for his pains. But to the second objection "that there was no consideration to ground the promise, and that the undertaking was *nudum pactum*," Holt, Chief Justice, and the rest of the court, answered, that the owner's trusting the defendant with the goods, was a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them; but this was a different case; for *assumpsit* did not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing.

And upon the same principle, it was holden (a), that if a carpenter undertakes to build or repair an house, and he does it unskilfully, an action on the case will lie against him for his misfeasance, though no consideration be alleged.

Of a past or executed Consideration.

If the consideration is wholly past and executed, it will not support a subsequent promise, unless the consideration was executed either at the express or implied request of the party promising. For it is not reasonable that one man should do another

(z) Ld. Raym. 909. *Et vide post*, Part 3. tit. Bailment of Goods.

(a) Rol. Abr. 9. l. 50. Ld. Raym. 919, 920. 5 Term Rep. 149.

a kindness; and then charge him with a recompence: this would be obliging him whether he would or not, and bringing him under an obligation without his concurrence.

Thus, in the case of *Hunt v. Bate*; (b) the servant of a man was arrested and imprisoned in the Compter in London for a trespass; and he was let to mainprize by the manucaption of two citizens of London (who were well acquainted with the master), in consideration that the business of the master should not go undone. And afterwards, before judgment and condemnation, the master, upon the said friendly consideration, promised and undertook to one of the mainperners to save him harmless against the party plaintiff, from all damages and costs, if any should be adjudged, as happened afterwards in reality; after this the surety was compelled to pay the condemnation, amounting to thirty-one pounds, &c. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at nisi prius against him. But it was afterwards moved in arrest of judgment, that the action did not lie. And by the opinion of the court, "the action does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement, and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head." Wherefore judgment was given for the defendant.

But, in the same report, it is added, that in another like action brought upon a promise of twenty pounds made to the plaintiff by the defendant, in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant; it was holden that this was a good consideration, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant.

So, in an action on the case, (c) in consideration that the plaintiff, at the request of the defendant, had taken such a one apprentice, the defendant undertook that he should serve truly, &c.

(b) Dy. 272. a.

(c) Hil. 36. Eliz. Harris's case, Dy. 272. a. n. 31.

and adjudged that this is a good consideration, although it were passed, because it was at the request of the defendant.

So, in consideration of one hundred and ten pounds given to a stranger, (d) at the instance of the defendant, the defendant undertook; and adjudged a good consideration, although it was passed, because it was at the instance of the defendant.

The distinction taken in these cases was agreed to by all the Justices in *Sidenham* and *Worlington's* case, (e) which was an action of *assumpsit*, wherein the plaintiff declared, that he, *at the request of the defendant*, was surety and bail for J. S. who was arrested into the *King's Bench* upon an action of 30*l.* and that afterwards for the default of J. S. he was constrained to pay the 30*l.*; after which, the defendant, meeting with the plaintiff, promised him, for the same consideration, that he would repay that 30*l.*, but which he afterwards refused; and for the recovery thereof this action was brought. It was objected that this consideration could not maintain the action, because the consideration and promise did not concur and go together. *Anderson*, Ch. J. said: "This action will not lie; for it is but a bare agreement, and *nudum pactum*, because the contract was determined, and not in *esse* at the time of the promise; but he said, it is otherwise upon a consideration of marriage, for marriage is always a present consideration." *Windham* agreed with *Anderson*, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warranty; for that such warranty ought to have been made or given at such time as the horse was sold: *Periam*, Justice, conceived that the action did well lie, and he said, "This case is not like unto the cases which have been put on the other side, for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration, the promise, and the sale ought to meet together; for a contract is derived from *con* and *trabere*, which is a drawing together, so that in contracts every thing which is requisite ought to concur and meet together, *viz.* the consideration on the one side, and the sale or the promise on the other side. But to maintain an action upon an *assumpsit* the same is not requisite; for it is sufficient if there be a moving

(d) *East*. 38 Eliz. *Foster's* case, Dy. 272. a. n. 31.

(e) 2 Leon. 224.

cause or consideration precedent, for which cause or consideration the promise was made; and such is the common practice at this day: for in an action on the case upon a promise, the declaration is laid, that the defendant for and in consideration of 20l. to him paid, afterwards, that is to say, at a day after, *super se assumpsit*, and that is good, and yet there the consideration is laid to be executed. And he said that the case of *Hunt v. Bate*, would prove the present case: for in that case it was adjudged that the action would not lie, because the consideration was precedent to the promise, and because it was executed and determined long before. But it was holden by all the Justices, that if *Hunt* had requested *Bate* to have been surety or bail, and afterwards *Hunt* had made the promise upon that consideration, the same had been good; for that the consideration did precede, and was at the instance and request of the defendant."—*Rhodes*, Justice, agreed with *Periam*, and he said, "That if one serve me for a year. and hath nothing for his service, and afterwards, at the end of the year, I promise him 20l. for his good and faithful service ended, he may have and maintain an action upon the promise; for it is made upon a good consideration: but if a servant hath wages given him, and his master, *ex abundanti*, doth promise him 20l. after his service ended, he shall not maintain an action for the 20l. because there is not any new cause or consideration *preceding* the promise;" which difference was agreed by all the Justices: and afterwards, upon good and long advice and consideration had of the principal case, judgment was given for the plaintiff, and they much relied upon the case of *Hunt* and *Bate*.

So, in the case of *Townsend v. Hunt*, (f) where the plaintiff, at the request of the defendant, had made a general release to him and his wife (she being executrix of F. T. under whose will the plaintiff claimed a legacy of 600l., 53l. of which he had been paid, and had afterwards executed the release in question), the defendant in consideration thereof promised the plaintiff, that if his wife did not pay the seven pounds, residue of the legacy in her life time, he would pay it after his wife's death: It was holden, that though the promise was made after the release, yet, forasmuch as the release was made at the defendant's request, and the defendant had the benefit of it, the promise upon this consideration was good enough.

(f) Cro. Car. 408.

So also, in the case of *Bosden v. Sir John Thinn*, (g) where the plaintiff declared, that whereas the defendant requested the plaintiff to give his credit for two tuns of wine for one *Roberts*, to one *Fludd*, amounting to 50*l.*; he thereupon gave his bond of 100*l.* for the payment of the 50*l.*, and for the nonpayment thereof was sued, and enforced to pay 70*l.*; and showing this to the defendant, he, in consideration of the premises, assumed to the plaintiff to pay the 70*l.*, &c.—It was moved, that this promise was not sufficient, it being upon a consideration past. But the court held, that the consideration and promise were valid; because *Roberts*, upon the plaintiff's undertaking at the defendant's request, had credit given him by *Fludd*; and the plaintiff was damnified by reason thereof, which in conscience the defendant ought to satisfy.

So, where a party derives benefit from a past consideration, the law, in some instances, will raise an *implied request*; as where a man pays a sum of money, or buys any goods for me without my knowledge or request, and afterwards I agree to the payment, or receive the goods, this is equivalent to a previous request. (b)

So, in consideration that the plaintiff had buried the defendant's son or wife, during the absence or separation of the father or husband; this is good without any previous request. (i)

Of a Consideration executed in Part.

If a consideration be executed in part only, and is continuing, it will support a subsequent promise.

Thus, in the case of *Pearle v. Unger*, (k) which was an action of *assumpsit*, wherein the plaintiff declared, that he was possessed of certain lands for years, the defendant, in consideration he had occupied the land, and had paid the rent to the defendant, viz. 30*l. per annum*, all the time he had occupied it, assumed to save

(g) Cro. Jac. 18. Yelv. 40.

(b) See 1 Saund. 264. n. 1. Str. 933. 2 Barnard Rep. 55. 71. 140. 3 Burr. 1671.

(i) T. Raym. 260. Dy. 272. a. n. b. Bul. N. P. 147. 1 H. Bl. 90.

(k) Cro. El. 94. 1 Leon. 102. S. C.

him harmless for the occupation of the land always during the term, as well for the years past as to come; and alleged that before the time of the promise, viz. such a day, &c. his beasts were taken *damage feasant*, &c., and that the defendant had not saved him harmless of it. It was moved in arrest of judgment, that there was no consideration to maintain the action; for the consideration and cause of the promise was a thing done before, viz. the occupation and payment of the rent; which being past, are no considerations for a thing future to be done.—But it was adjudged for the plaintiff; for the consideration, that he was in possession, and had paid his rent, and was to pay his rent, is sufficient to cause the other to defend his possession for the time past and to come.

So, where one being possessed of a shop (l) agreed to demise it to another, paying to him 40s. by the year, and 10s. for the last quarter; and for the perfecting the agreement each gave the other 1s., and afterwards, in consideration of the premises, the lessee promised to give the lessor 30l. and assumed to pay it; in consideration whereof, and in performance of the contract, the lessor made a lease to the lessee accordingly; and the action was brought for the 30l.—It was objected that there was no good consideration expressed to raise the promise for the 30l., the same being grounded upon a consideration that was past, perfect, and executed, and so no good consideration. *See per curiam*. The lease here is made *after* the promise; the agreement is in performance of *all*, not of part; it was on the lessor's part to make the lease to the defendant, and on his part to pay the rent of 40s; and the 30l. in consideration of his quietly enjoying the same, which is a *valid promise*, founded upon a good and sufficient consideration.

So, in the case of *Ware v. Morse*, (m) the plaintiff declared, that in consideration he had bought of the defendant three parcels of land on such a day, the defendant afterwards on another day, promised to make him a sufficient assurance. It was adjudged that the consideration was not absolutely past, for the assurance was the substance of the sale.

(l) *Jones v. Clark*, 2 Bull. 73. Rol. Abr. 12. l. 5.

(m) Cro. El. 138.

So, a promise on a consideration *executed* is good, if there were a duty before; as where the plaintiff declared that on such a day, the defendant was indebted to him in a certain sum, for diverse goods sold to him; and for money lent; and also for money due upon an account stated; and being so indebted, the defendant in consideration thereof afterwards, on such a day promised to pay, &c. It was holden, that this is a good consideration to raise an *assumpsit*; for the continuance of the debt is a consideration continuing and sufficient to support an action. (n)

*Of a Promise in Consideration of a precedent Debt
or Duty voidable by Statute, &c.*

Where a man is under a moral obligation, which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration: As, if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations: (o) or, if a man, after he comes of age, (p) promises to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; (q) or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. (r)

In such, and many other instances, though the promise gives a compulsory remedy where there was none before either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. (s)

A subsequent promise, however, will revive that which is *voidable* only; therefore where the consideration is *void* in its creation, no promise can set it up again. As, if all the creditors of an insolvent consent to accept a composition for their demands on an

(n) *Hodge v. Vavisor*, 1 Rol. Rep. 413. Rol. Abr. 12. l. 30. ad. 45. 13 l. 45. *Johnson v. Astell*, 1 Lev. 198. Mo. 854.
(o) *Ld. Raym.* 389. (p) *Stra.* 690. 1 Term Rep. 648.
(q) *Cowp.* 544. *Doug.* 101. n. 2 Term Rep. 765. *Ni. Pri. Abr.* 52.
(r) *Cowp.* 290.
(s) Per Lord *Mansfield*, *Cowp.* 293. See also 2 Bl. Com. 445. 3 Bos. and Pul. 249. n. 2.

assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, as the condition of his executing the deed, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, and will not maintain an action. (t)

Of a Consideration void in Part.

If a contract or agreement be made upon two considerations, and one of them cannot be performed; this will not avoid the contract; and in an action thereon, the damages shall be intended to be wholly given for the good consideration. (u)

As in consideration of the assignment of a title to dower, and the not suing an attachment out of chancery upon a decree; though a title to dower cannot be assigned, but released to the *terre-tenant*. (v)

So, in consideration of a permission to remove goods, and relinquish a foreign attachment, though it cannot be relinquished. (w)

So, in consideration of two things; and one of them is insufficient; as, in consideration of forbearance of a debt due from the defendant and his son; though, as to the debt of the son, it is of no value. (x)

And the void consideration need not be proved. (y) But if one of the considerations is found false by the jury, the action fails. (z)

Or, if one of the considerations is unlawful, that vitiates the whole, and the plaintiff shall recover for nothing; as, in consideration of 2s., and the escape of R.; for the permitting the escape is unlawful. (a)

(t) *Cockbott v. Bennett*, 2 Term Rep. 763.

(u) Cro. El. 149. 1 Sid. 38. Contra. 4 Leon. 3.

(v) Cro. El. 847. 1 Rol. Abr. 30. l. 15. (w) Yelv. 56.

(x) 1 Sid. 38. T. Raym. 32.

(y) Com. Dig. tit. Action upon *Assumpsit*, B. 13.

(z) Cro. El. 848.

(a) Cro. El. 199. See also 1 Sid. 38. 4 Leon. 3. Cro. Jac. 103.

Of a Consideration arising from a third Person.

A promise, in some cases, is valid, though the consideration on which it is made arise in part from another; as if a man promise a pigg of lead to A. and his executor give lead for that purpose to B. who undertakes to deliver it to A.; an action lies by A. against B. upon his undertaking. (b)

So, in the case of *Dutton and wife v. Pool*, (c) the plaintiff declared, that his wife's father being seized of certain lands, now descended to the defendant, and being about to cut down 1000l. worth of timber off from the said lands to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to sell the timber, that he would pay the daughter 1000l. After verdict for the plaintiff, upon *non assumpsit*, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father, or if the father were dead, by his executors, for the promise was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her: but *Scroggs*, Ch. J. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her portion by these means.

But, in general, it is necessary that the consideration on which the promise is founded should move from the party in whose favour the promise is made.

Thus, in the case of *Bourne v. Mason*, (d) where the plaintiff declared, that A. being indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, and there being a communication between the parties, the defendant, in consideration that A. would permit the defendant to sue B. in A.'s name for the recovery of the sum due from B. to A. promised that he, the defendant, would pay A.'s debt to the plaintiff, and alleged that A. permitted the de-

(b) 1 Rol. Abr. 27. l. 40. 31. l. 5.

(c) 2 Lev. 210. 1 Vent. 318. 332. T. Raym. 302. S. C.

(d) 1 Vent. 6.

defendant to sue accordingly, and that he recovered : after verdict for the plaintiff, upon *non assumpsit*, it was moved in arrest of judgment, that the plaintiff could not maintain this action : and of this opinion were the court, observing, that the plaintiff was a mere stranger to the consideration, having done nothing of trouble to himself, or of benefit to the defendant.

So, in the case of *Crow v. Rogers*, (e) where the plaintiff declared, that J. S. was indebted to the plaintiff, and it was agreed between J. S. and the defendant, that the defendant should pay to the plaintiff the debt due to him from J. S., and that J. S. should make the defendant a title to a house, in consideration whereof the defendant promised to pay to the plaintiff the debt due to him from J. S., and then averred that J. S. was always ready to perform his part of the agreement : on demurrer, judgment was given for the defendant, because the plaintiff was a stranger to the consideration.

Of a Consideration which the Party cannot perform.

The consideration must be such as the party to whom a promise is made, has a power by law to perform or cause to be performed.

Thus, in the case of *Harvey v. Gibbons*, (f) the plaintiff declared, that he being bailiff to J. S., the defendant in consideration that the plaintiff would discharge defendant of a debt due to him, promised, &c. After verdict and judgment for the plaintiff in the court below, it was reversed in B. R. because the plaintiff could not discharge a debt due to his master.

The principle established by the preceding case, was recognized by Lord *Kenyon*, Ch. J. in the case of *Nerot v. Wallace*, (g), where the consideration was, that the plaintiffs, who were assignees under a commission of bankrupt against J. S. would forbear to proceed to have the examination of J. S. taken before the commissioners concerning certain sums, with which J. S. was charged, and that the commissioners would forbear, and desist accordingly. Lord *Kenyon* said, "The ground on which I found my judgment is this ;

(e) *Str.* 592. See also *1 Vin. Abr.* 333. to 337. *1 Bos. and Pul.* 101. n. c. *3 Bos. and Pul.* 149 n. a.

(f) *2 Lev.* 161. (g) *3 Term Rep.* 22.

that every person, who in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact, but law." Now the promise made by the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform; because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees stipulated, not only for their own acts, but also that the commissioners should forbear to examine the bankrupt: but clearly they had no right to tie up the hands of the commissioners by any such agreement. And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it.

CHAPTER III.

Of Illegal Contracts.

ALL contracts or agreements which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void : For *ex turpi contractu actio non oritur*, is a rule both in law and equity. (a) And whenever a contract or agreement is entered into with a view to contravene any of these general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction.

Thus, in an action upon a bond (b) given for compounding a prosecution for perjury, it was argued, in support of the action, that no averment could be admitted of the bond having been given for such a consideration, because it did not appear in the condition. But to this it was answered by Lord Ch. J. *Wilmot*, "that the manner of the transaction was to gild over and conceal the truth ; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth ; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. This is a contract to tempt a man to transgress the law, to do that which is injurious to the community : it is void by the common law ; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for iniquity.* All

(a) See Fonbl. Treat. of Equity. 1. V. Bk. 1. c. 4. s. 4. n. y.

(b) *Collins v. Blantern*, 2 Wils. 341. 347. See also 1 P. Wms. 156. 220.

“ writers upon our law agree in this, no polluted hand shall touch
“ the pure fountains of justice.”

But, a contract or agreement must be unlawful at the time of making it, otherwise it cannot be set aside; for, it is said, (c) the law knows of no contract but what was good or bad at the time of the contract made; it cannot be one or other, according to a subsequent contingency.

In this chapter it will only be necessary to take a general view first, of contracts and agreements which are void by the common law; and secondly, of those which are prohibited by statute.

In considering those which come under the first class, it is hardly necessary to state that every contract or agreement which has for its object any thing forbidden by the law of God: as to commit murder, theft, perjury, or the like, is void by the common law. Therefore if a man is under an obligation to pay to another 20*l.* if he will kill or rob such a person; this is a void obligation, and creates no right. (d)

The common law also prohibits every thing which is unjust, or *contra bonos mores*. Therefore a contract or agreement which is made in contravention of these general principles is void: for instance, if A. promise in consideration of 20*s.* paid to him by B. he will pay B. 40*s.* if he does not beat J. S. out of such a close: this is illegal and void. (e)

So, if A. request B. to beat another, and promise to save him harmless; this is a void consideration, for the act is unlawful. (f)

But, it is said, (g) if I request another to enter into B.'s land, and in my name to drive out the beasts, and impound them, and promise to save him harmless, this is a good *assumpsit*, though the act is tortious.

Future Cohabitation, &c.] Contracts entered into with a view to future cohabitation and prostitution are illegal and void, as being against

(c) Per Cur. 10 Mod. 67. See also Bul. N. P. 146.

(d) Fitzh. Abr. tit. Obligation 13. (e) 2 Lev. 174.

(f) Hutt. 56. (g) Per Hobart. in the case of *Hutton and Winch*, Win. 49.

public morality. (h) But an engagement merely by way of reparation for *past* seduction and cohabitation is valid; for this is no more than what a man ought, in honor and conscience, to do. (i)

So, a contract for the use and occupation of lodgings which are let expressly for the purposes of prostitution, is void. (k)✓

But an agreement to pay for the washing and getting up of expensive articles of dress for a prostitute is valid, though it be known to the party by whom the work is done, that the dresses are to enable her to appear at public places, &c. (l)

A contract for the sale of prints of an immoral and libellous tendency has also been holden to be illegal and void. (m)

So, all contracts and agreements which have for their object any thing contrary to principles of *sound policy* are void by the common law. (n)

Restraint of Trade.] Under this description may be ranked contracts which bind any to a total restraint of trade; for all such obligations are contrary to principles of *national policy*; one great object of which is to encourage and promote trade. Therefore it has been holden, that a promise or obligation which binds any to a *total* restraint of trade, whether for a limited time, or generally, is unlawful and void. (o) But, if a man for a good consideration restrains himself from the exercise of his trade in a particular place, this is lawful: for the policy of the nation is not concerned in what place a man exercises his calling. And there may happen instances wherein such a contract may be useful and beneficial; as to prevent a town from being over-stocked with any particular trade: Or, in the case of an old man, who, perceiving himself under such circumstances of body or mind, as that he is likely to be a loser by continuing his trade, will find it better to part with it for a consideration; that, by selling his

(b) *Walker v. Perkins*, 3 Burr. 1568. See also 2 Vef. 160. 5 Vef. jun. 293.

(i) *Armandale v. Harris*, 2 P. Wms. 432. *Cray v. Rooke*, Forrester 153. *Turner v. Vaughan*, 2 Will. 339.

(k) 1 Esp. Rep. 13. Ni. Pri. Abr. 59, 60. *Et vide post*, Part III. tit. Use and Occupation. (l) 1 Bos. and Pul. 340.

(m) Per Lawrence Just. in *Fores v. Jabner*, 4 Esp. Rep. 97. *vide post*, Part III. tit. Goods sold, &c. (n) Cowp. 39.

(o) *Vide Mutchel v. Reynolds*, 1 P. Wms. 181. *Et post*, Part III. tit. Contracts in Restraint of Trade.

custom,

custom, he may procure to himself a livelihood which he might probably have lost by trading longer. (p)

Restraint of Marriage.] Upon the same principle of *public policy*, the common law makes void all contracts and agreements which totally restrain a person from marrying; or from marrying any body except a particular person, without imposing an obligation to marry that particular person: Thus, where A. promised B. that he would not marry with any person besides herself; if he did, he agreed to pay her 1000*l.* In an action (q) of covenant upon this contract, the Court of *King's Bench* held, that this was an agreement in restraint of marriage; for it was not a covenant to marry the plaintiff; but not to marry any one else: and yet she was under no obligation to marry him; so that it restrained him from marrying at all, in case she had chosen not to permit him to marry her.

Marriage brokerage Contracts.] So also, all *marriage brokerage contracts* are void. (r) These contracts are so called from the circumstance of their promising a reward to a person if, by reason of the influence which he may possess over one of the parties to the match, which is sought to be accomplished, he can procure a marriage between them. They are also considered to be of a very pernicious tendency, by being the occasion of many unhappy marriages.

Simoniacal Contracts.] So, all *simoniacal contracts* are void: Thus, where the consideration of the contract was, that the plaintiff would procure the defendant to be presented and instituted to a chapel, which was a donative in the king's gift; it was adjudged illegal, on the ground of its being simony, and therefore incapable of supporting an *assumpsit*. (s)

(p) Vide *Mitchel v. Reynolds*. 1 P. Wms. 191. *Et post*, Part III. tit. Contracts in Restraint of Trade.

(q) *Love v. Pears*, 4 Bur. 225. See also 2 Vern. 102. 215. 2 Eq. Ca. Abr. 248. 1 Atk 287. 2 Atk. 538. 540. 10 Ves jun. 429

(r) See *Arundel v. Troullian*, 1 Ch. Rep. 47. *Hall v. Potter*, 3 Lev. 411. Show. P. C. 76. 4 Bro. P. C. 144. 8vo ed.

(s) Cro. Car. 337. 353. 361. 1 Rol. Abr. 18. l. 5. See also the case of *Fyche v. Bishop of London*, Cunningham's Law of Simony, 52. 4 Term Rep. 359.

Maintenance of Suits] So, all contracts and agreements for the maintenance of suits, are illegal and void. (t) Maintenance is an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. It is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. And any agreement made in respect of such maintenance is valid. (u)

Contracts made to prevent the due course of justice, &c.] So, every agreement or promise which is made with a view to prevent the due course of justice is illegal: As, if A. promise B. money in consideration that he will not give evidence in a cause; such promise cannot be enforced; it being unlawful and iniquitous for any man to suppress testimony in any cause. (v)

So, a promise made by the friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as being against the policy of the bankrupt laws. For the intention of the legislature was that the creditors should have the full examination of the bankrupt, as to the state of his effects and the disposition of them; whereas the promise in this case would be to induce the assignees and commissioners to forbear doing their duty. (w)

But a covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission is lawful. (x)

Contracts with Sheriffs, &c.] So, if a sheriff for 10l. promise that a prisoner shall escape, this promise is unlawful and void. (y)

(t) See 1 Leon. 179. Dy 355. b. (u) See 1 Hawk. P. C. cap. 83.

(v) 1 Leon. 180. (w) *Nerot v. Wallace*, 3 Term Rep. 17.

(x) *Kaye v. Bolton*. 6 Term Rep. 134. ante 28

(y) 10 Co. 102. Cro. El 199.

So, where A. is in execution at the suit of B. ; and C., in consideration that the gaoler will permit A. to go at large, assumes and promises to him that A. shall pay the debt at a certain day, and that he the said C. will save the gaoler harmless ; this promise is void, because the consideration is against law. (z)

So also, a promise to a bailiff to give him a sum of money to accept bail, is void ; it being the duty of the sheriff to take good and sufficient bail when tendered to him. (a)

So, if A. obtains a judgment against B., and thereupon takes out an *elegit*, and delivers it to the under-sheriff, who by virtue thereof seizes certain goods of B., and afterwards the under-sheriff, in consideration that A. will take out a new *elegit*, and deliver it to him, promises to cause and procure the said goods to be found by inquisition, and to deliver the same to such person as A. shall appoint, &c. ; this promise is against law, being to do a thing against the duty of his place, by which he is bound to return an indifferent and equal jury between the parties ; and though part of the promise was to do a lawful act, yet that depending upon the other part, which was illegal, makes the whole void. (b)

But a contract to indemnify a sheriff in the doing of a lawful act is good.

Thus, where a plaintiff, in an action, pointed out particular goods, and desired the sheriff to take them under a *feri facias* ; and in consideration that the sheriff would take them, the plaintiff promised to indemnify him ; this was held a valid promise ; for the plaintiff having pointed out the goods, and required the sheriff to take them in execution, it was reasonable that he should save the sheriff harmless. (c)

So, where A. was arrested, and C., in consideration that the bailiff would suffer A. to continue in the house of C. till the next morning, promised that he would then deliver A. in safe custody to the

(z) Yelv. 197. 2 Bulst. 213.

(a) *Smith v Stotesbury*, 2 Burr. 924. 1 Bl. Rep. 204 S. C.

(b) *T. Jones*, 24. Cart. 223.

(c) *Cro. Jac.* 652. See also 1 Ld. Raym. 279.

bailiff; this was held to be a lawful consideration; for it shall not be intended that the bailiff was ever absent from B., so that it could be no escape. (d)

Trading with the Enemy.] All trading with the subjects of an enemy's country, without the king's license, is illegal. Therefore a policy of insurance on enemy's property is void. (e)

It is also illegal for a subject in time of war, without the king's license, to bring, even in a neutral ship, goods from an enemy's port, which were purchased by his agent resident in the enemy's country, after the commencement of hostilities; although it may not appear that they were purchased of an enemy. (f)

But, a neutral subject residing in the enemy's country, and carrying on trade there in partnership with an alien enemy, may insure his interest in the joint property. (g)

Wagers.] All wagers which have a tendency to incite a breach of the peace, or which are contrary to principles of sound policy or morality, are illegal, and void by the common law: as, if a wager be laid on the event of a battle; (h) or upon the sex of a person; (i) or upon the event of war or peace; (k) or of an election of members to serve in parliament; (l) or respecting the produce of any branch of the revenue; (m) these are unlawful and void.

So, if a wager is made merely as a colour to disguise an illegal transaction, as simony, bribery, usury, or the like, they are equally void. (n)

But, in general, a wager may be considered as legal if the subject of it has no immediate tendency to a breach of the peace, or

(d) 1 Sid. 132. 1 Keb. 483. 1 Lev. 98.

(e) 8 Term Rep. 548. 6 Term Rep. 23. 4 East. 402. 417. But see Salk 46. Ld. Raym 282. Bac. Abr. tit. Alien. D. as to the distinction between alien friend and alien enemy, &c.

(f) *Potts v. Bell*, 8 Term Rep. 548. (g) 6 Term Rep. 413.

(h) 5 Term Rep. 405. (i) Cowp. 729.

(k) 1 Term Rep. 57. n. b. (l) 1 Term Rep. 56.

(m) 2 Term Rep. 610. 2 Bos. and Pul. 130. (n) Cowp. 39.

to affect the feelings or interest of a third person; and is not contrary to the principles of morality or sound policy. (o)

Fraudulent Contracts.] Contracts which are infected with fraud are void both at law and in equity: for the basis of all dealings ought to be good faith.

Therefore, where two sutlers (p) to several regiments of militia (who as such were entitled to certain forage of oats and hay for divers horses daily out of the king's magazine belonging to the camp) entered into an agreement with the person who furnished and supplied the magazine, that the sutlers would abstain from taking the forage, or such part thereof as they should think fit, and would leave the same to be the property of the person supplying them, and that he should pay and allow them 9d. by the ration, for every ration to which they should be entitled, and which they should so leave at the magazine: this was held to be a corrupt agreement between the parties, as having for its object the cheating of government, by taking a composition for the forage of the whole number of horses allowed, whether they were kept or not, which was a clear fraud upon the public.

So, where goods are put up to sale by public auction, under the usual conditions, viz. "that the highest bidder shall be the purchaser," if the owner, or any third person on his behalf, *secretly* attend the sale and bid for the goods, in order to enhance the price, it is a fraud upon the real bidders; and the sale is therefore void. (q)

So, if A. agree to purchase goods of B. at a certain sum for the benefit of C.; any secret agreement between B. and C. that the latter shall pay a further sum for them is void, as a fraud on A.; and C. is not liable to pay such further sum. (r)

(o) *Vide* the cases on this subject *post*, Part III. tit. Wagers and Money had and received upon illegal Wagers.

(p) *Willis* and another v. *Baldwin*, Doug. 450.

(q) *Bexwell v. Christie*, Cowp 395. *Howard v. Castle*, 6 Term Rep. 642. S. P. But see 1 Fonbl. Treat. of Eq. 1 Bk. c. 4. f. 4. n. x. *Christie v. the Attorney General*, 6 Bro. P. C. 520.

(r) *Jackson v. Duchaire*, 3 Term Rep. 551.

So, an agreement to pay so much in the pound for recommending customers to purchase goods, is said (s) to be illegal; such engagements having a tendency to enhance the price of the goods; and consequently a species of fraud upon third persons.

So, if all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made; the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, and therefore will not support an action. (t)

Fraudulent Representation and Concealment of material Circumstances.] The only remaining circumstance which need be noticed in this general view of the subject is the *fraudulent representation, or concealment of material circumstances, which, it is said, (u) vitiates all contracts.* For it is a rule, that each of the contracting parties is bound to disclose faithfully to the other all material circumstances within his knowledge respecting the subject matter of the contract; and if this be committed either from design, neglect, or accident, the contract is void.

With respect, however, to concealment, it is apprehended that the rule only applies to cases of concealment of material circumstances which are *exclusively* within the knowledge of *one* of the contracting parties; and does not extend to cases of sales, where both parties inspect the commodity bargained for, and each exercises his own judgment as to the quality and value, &c. and where no deceit is practised by either party. (v)

(s) *Per Lord Ellenborough, Wyburd v. Stanton*, 4 Esp. Rep. 179.

(t) *Cockshott v. Benne.t*, 2 Term Rep. 763. *Jackson v. Lomas*, 4 Term Rep. 166. *Leicester v. Roje*, 4 East 372. S. P. *ante* 25.

(u) *Per Yates, Just.* 2 Bl. Rep. 465. See also 2 P. Wms. 170. Doug. 260. 1 Term Rep. 12. Skin 327.

(v) *Vide* 2 Bl. Com. 451. 3 Bl. Com. 166. *Et vide post*, Part III. tit. Warranty. See also Sugden's Law of Vendors, 1 ad. 19.

Having

Having now shown what contracts and agreements are void at the common law, I shall proceed to point out those which are made void by statute.

It is said (w) that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute.

11th 5/16.
5 Nov

So, a contract which is declared by a particular statute to be illegal, is not made good by a repeal of that statute after the contract has been executed. (x)

Sale of Offices, &c.] By the statutes 12 R. 2. c. 2. and 5 and 6 Ed. 6. c. 16. the sale of certain public offices, and the deputations thereof, are prohibited; and, by the latter statute, it is enacted that all agreements, covenants, bonds, or assurance for any of the said offices, or the deputation thereof, shall be void. (y)

By the stat. 23 Hen. 6. c. 9. the sheriff is directed to let out of prison all persons by them arrested on mesne process, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons. And it is enacted, "that no sheriff shall take any obligation for any cause therein directed, but only to themselves; of any person, nor by any person which shall be in their ward by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the writ, bill, or warrant, and in such places as the said writs, bills, or warrants, shall require. And that if any of the said sheriffs, or other officers or ministers, take any obligation in other form, by colour of their offices, it shall be void."

(w) *Per Holt*. Ch. J. Carth. 252.

(x) 1 H. Bl. 65.

(y) For the cases upon this subject, *vide post*, Part III. tit. *Contracts respecting the Sale of Offices, Contracts with Sheriffs, &c.*

Upon this statute it has been holden, that if a sheriff let a prisoner, who is not bailable, go at large upon his single bond; such obligation is void. (z)

This statute also extends to *promises*, as well as to *obligations*; and accordingly it has been holden, (a) that an agreement in writing to put in good bail for a person arrested on mesne process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of a sheriff, in consideration of his discharging the party arrested, was void by the statute of Hen. 6.; for, since the passing of that statute, the usage has been to take the security by bond; and that bond, by the words of the statute, must be entered into to the sheriff, or to such officer as has the return of process; whereas here was no bond, but a mere simple contract, and that with the sheriff's officer; and farther the bond must be given only for the appearance of the party, and for no other purpose.

[*Usury*.] By 12 Ann. st. 2. c. 16. to prevent *usury*, it is enacted, "that no person or persons whatsoever, upon any contract, shall take directly, or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made for payment of any principal, or money to be lent or covenanted to be performed upon or for any usury, whereupon, or whereby there shall be referred or taken above the rate of 5*l.* in the hundred, as aforesaid shall be utterly void."

These restrictions, however, do not apply to contracts made in foreign countries; for on such contracts, our courts will direct the payment of interest according to the law of the country in which such contract was made. (b) Thus, *Irish*, *American*, *Turkish*, and *Indian* interest have been allowed in our courts to the amount of even 12*l. per cent.* For the moderation or exorbitance

(z) 10 Co. 100. b.

(a) *Rogers v. Reves*, 1 Term Rep. 418.

(b) 1 P. Wms. 395. See also Fonbl. Treat. of Eq. 1 bk. c. 4. f. 7.

of interest depends upon local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade. (c)

Every security given upon an usurious consideration is so contaminated by it, that the statute of usury makes the security absolutely null and void; so that it cannot be enforced by law by any person, however innocent. Therefore, it has been held, (d) that a bill of exchange, or a promissory note, given upon an usurious consideration, is void, even in the hands of an indorsee for a valuable consideration without notice of the usury. *attested by*

But if a bill of exchange has been given for a *bona fide* consideration, usury in any of the intermediate indorsements, shall not void it in the hands of a *bona fide* indorsee, in an action against the acceptor. (e)

Gaming.] Gaming is also prohibited by statute, though at common law, the playing at cards, dice, &c. when practised innocently, and as a recreation, is lawful if it be not within the restriction of any statute. (f) But as the practice was found to encourage idleness and other vices, the statute 33 Hen. 8. c. 9, restrained it among the inferior sort of people. Gentlemen were, however, still left free to pursue it, until the 16 Car. 2. c. 7. by which it is enacted, that "if any person, by playing or betting, shall lose more than 100*l.* at one time, he shall not be compellable to pay his loss, and the winner, shall forfeit treble the value; one moiety to the king, the other to the informer." This provision of the legislature was, however, soon found to be insufficient to its purpose: it was therefore enacted, by the stat. 9 Anne, c. 14. "that all bonds, and other securities, given for money won at play, or money lent at the time to play with, should be utterly void; that all mortgages or incumbrances of lands, made upon the same consideration, should be and enure to the use of the mortgagor, and that if any person at one time lose 10*l.* at play, he may, within three months, sue the winner, and recover it back by action of debt at law: and in case the loser does not,

(c) See *Stapleton v. Conway*, 3 Atk. 727. Fonbl. Treat. of Eq. bk. 5. c. 1. §. 6.

(d) *Lowe v. Wood*, 1 Doug. 736. See also *Wright v. Wright*, 1295. n. 1.

(e) *Daniel v. Daniel*, 1 Esp. Rep. 274. See also *Parr v. Eliafon*, 1 East, 92. S. P. *Bulling v. Frost*, 1 Esp. Rep. 235.

"within

"within the time limited, sue and prosecute, any other person
 "may sue the winner for treble the sum so lost; and the winner
 "is obliged and compellable to answer upon oath any bill or bills
 "filed against him for discovering the sum or sums of money, or
 "other thing, so won by him at play."

Subsequent statutes have superadded further penalties to restrain this fashionable vice; "which," Sir *William Blackstone* observes, (g)
 "may shew that our laws against gaming are not so deficient as
 "ourselves and our magistrates in putting these laws in execu-
 "tion."

It is observable, that the stat. 16 Car. 2. declares, that the contract for money lost at play, and all securities given for it, shall be utterly void; but the stat. 9. Anne, confines itself to the securities for money won or lent at play. Upon which it has been determined, that though both the security and the contract are void as to money won at play, only the security is void as to money lent at play; and that the contract remains, and the lender may maintain his action for it. (h)

These acts having declared the security void, it may be observed, that a bill of exchange given for money won at play, cannot be recovered upon, though in the hands of an indorsee for a valuable consideration, and who is totally ignorant of the circumstance affecting the security. (i)

Stock-jobbing.] So, in order to prevent the pernicious and destructive practice of stock-jobbing, it is enacted by the 7 Geo. 2. c. 8. (made perpetual by 10 Geo. 2. c. 8.) "That all contracts and
 "agreements whatsoever which shall be made or entered into by
 "or between any person or persons whatsoever upon which any
 "premium or consideration in the nature of a premium shall be
 "given or paid for liberty, to put upon, or deliver, receive, accept,
 "or refuse any public or joint stock, or other public securities
 "whatsoever, or any part, share, or interest therein, and also all
 "wagers, and contracts in the nature of wagers, and all contracts

(g) 4 Bl. Com.

(h) *Vide Robinson v. Dand*, 2 Burr. 1080. *v. Walmley*, 2 Stra. 1249. *Huffey v. Jacob*, Com. Rep. 4.

(i) *Bowyer v. Hampton*, 2 Stra. 1155. *Lowe v. Waller*, Doug. 736.

"in the nature of puts and refusals, relating to the then present
 "or future price or value of any such stock or securities, as afore-
 "said, shall be null and void to all intents and purposes whatso-
 "ever, and all premiums, sum or sums of money whatsoever,
 "which shall be given, received, paid, or delivered, upon all such
 "contracts or agreements, or upon any such wagers or contracts,
 "in the nature of wagers, as aforesaid, shall be restored and re-
 "paid to the person or persons, who shall give, pay, or deliver
 "the same, who shall be at liberty, within six months from and
 "after the making such contract or agreement, or laying any such
 "wager, to sue for, and recover the same from the person or per-
 "sons to whom the same is, or shall be paid, or delivered, with
 "double costs of suit, by action of debt founded on this act, to
 "be prosecuted in any of his majesty's courts of record, in which
 "action no essoin, protection, wager of law, or more than one
 "impairance shall be allowed; and it shall be sufficient therein
 "for the plaintiff to allege that the defendant is indebted to the
 "plaintiff, or has received to the plaintiff's use, the money or pre-
 "mium so paid or received, whereby the plaintiff's action accrued
 "to him, according to the form of this statute, without setting forth
 "the special matter."

Upon this statute it has been determined (*k*) that where A. being employed as a broker for B. in stock-jobbing transactions, paid the differences for him; a dispute arising between them, respecting the amount of A.'s demand, the matter was referred to C. who awarded 603*l*. to be due: on which A. drew on B. for 100*l*. part of the above, and indorsed the bill to C. after B. had accepted it; held that C. could not recover on the bill.

So, if a broker draw on his employer for differences paid for him in stock-jobbing transactions, and the employer accept the bill, and then the broker indorse it to a third person after it is due, the latter cannot recover on the bill. (*l*)

Lottery.] All contracts or agreements for the sale of any tickets, or shares of tickets, or chances, in any private lottery; or, for the sale of any chances of tickets in any public lottery; and all in-

(*k*) *Steers v. Losbley*, 6 Term Rep. 61.

(*l*) *Brown v. Turner*, 7 Term Rep. 630.

urances of numbers in any lottery, except by the holders of tickets in the public lottery, are prohibited by various statutes. (m)

Wager Policies, &c.] And, in order to prevent another species of gaming, called *wager policies, or insurances of interest or no interest*, the stat. 19 Geo. 2. c. 37. f. 1. enacts, "that no assurance shall be made by any person or persons, on any ship or ships belonging to his majesty, or any of his subjects, or on any goods, merchandizes, or effects laden or to be laden on board of any ship or ships, *interest or no interest, or, without further proof, or interest than the policy, or, by way of gaming or wagering, or, without benefit of salvage to the insurer; and that every such insurance shall be void to all intents and purposes.*" (n)

And, by the fourth section of this act, which was made to prevent *all re-assurances*, it is enacted, "that it shall not be lawful to make re-assurance, unless the assurer shall be insolvent, become a bankrupt or die; in either of which cases, such assurer his executors, administrators, or assigns, may make re-assurance to the amount of the sum before by him assured; provided it shall be expressed in the policy to be a re-assurance." (o)

By the stat. 6 Geo. 1. c. 18. f. 12. it is enacted, that all policies of insurance upon ships at sea, made by any corporation (other than the two corporations therein mentioned) or by persons acting in partnership, shall be void. (p)

So, all insurances upon *prohibited goods*, or relating to *contraband trading*, are void by the statutes 9 & 10 W. & M. c. 44. and 33 Geo. 3. c. 52. (q)

Smuggling.] So, *all contracts made in contravention of the revenue laws of this country* are void. Thus, where an agreement was made between two parties, (r) subjects of this country, for the

(m) *Vide* 5 Geo. 1. c. 9. f. 41. 8 Geo. 1. c. 8. f. 36. 6 Geo. 2. c. 35. f. 29. 12 Geo. 2. c. 28. 22 Geo. 3. c. 47. 42 Geo. 3. c. 119. f. 5. See also *Dacy v. Sbee*, 2 Term Rep. 617.

(n) For the cases upon this stat. *vide* *Park on Insurance*, chap. 14.

(o) *Vide* *Park on Insurance*, chap. 15. (p) *Ibid.* chap. 1.

(q) *Ibid.* chap. 12, 13. (r) *Biggs v. Lawrence*, 3 Term Rep. 454. *Vide* *post*, Part III, tit. Goods sold, &c.

sale and delivery of goods in *Guernsey*, for the purpose of being smuggled into *England*; it was holden, that the vendor could not maintain an action for the value of the goods. And in a subsequent case, (s) it was decided, that the circumstance of the vendor being an inhabitant of *Guernsey* would not alter the case, for he was still a subject of this country.

Treating Voters at Elections.] By the statute 7 and 8 W. 3. c. 4. (which was made to prevent all species of bribery and corruption at elections for members of parliament) it is enacted, "that no person after the teste of the writ to the sheriff, shall before his election directly or indirectly, give, present, or allow to any person or persons having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter, make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to any such county, city, &c. or to or for the use, &c. of any such person, in order to be elected, or for being elected to serve in parliament for such county, city, &c."

Upon this statute it has been holden, (t) that an inn-keeper furnishing provisions for voters, at the request of a candidate, after the teste of the writ, cannot recover the expences of such provisions against the candidate.

Agreement to sign a Bankrupt's Certificate.] All agreements by a bankrupt with a creditor to pay money, &c. for signing his certificate, is declared void by the stat. 5 Geo. 2. c. 30. s. 11. which enacts, "that every bill, note, contract, agreement, or other security whatsoever, to be made or given by any bankrupt, or by any other person, unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and such bankrupt's discharge, as a consi-

(s) *Clugas v. Pinaluna*, 4 Term Rep. 466.

(t) *Ribbans v. Crickett*, 1 Bos. and Pul 264. See also the Bribery Act, 2 Geo. 2. c. 24.

"deration,

“deration, or to the intent, to persuade him, her, or them to
 “consent to or sign any such allowance or certificate, shall be
 “wholly void and of no effect; and the monies thereby secured,
 “or agreed to be paid shall not be recovered or recoverable.” (u)

Sale of Liquors, &c.] By the statute 24 Geo. 2. c. 40. s. 12.
 (which was made for the purpose of preventing the *pernicious effects*
of dram-drinking and selling liquors in small quantities;) it is enacted,
 “that no person or persons whatsoever shall be entitled unto, or
 “maintain any cause, action, or suit for, or recover either in law
 “or equity, any sum or sums of money, debt, or demands what-
 “soever, for or on account of any spirituous liquors, unless such
 “debt shall have really been and *bond fide* contracted at one time,
 “to the amount of 20s. or upwards; nor shall any particular ar-
 “ticle, or item in any account or demand for distilled spirituous
 “liquors, be allowed or maintained, where the liquors delivered
 “at one time, and mentioned in such article or item, shall not
 “amount to the full value of 20s. at the least, and that without
 “fraud or covin.”

But this statute does not extend to liquors purchased for the pur-
 pose of being sold again. (v)

In what cases illegal contracts may be rescinded, and when the
 money paid upon them may be recovered back. *Vide post*, Part
 III. Chap. VII. tit. *Money had and received on Illegal Contracts*.

(u) *Vide Smith v. Bramley*. Doug. 696.

(v) *Vide Peake's Case*, N. P. 180. *et. vid. post*, Part III. tit. *Goods*
 sold.

CHAPTER IV.

*Of the Statute of Frauds and Perjuries upon
Contracts and Agreements.*

BEFORE the passing of the statute 29 Car. 2. c. 3. contracts and agreements were most commonly entered into verbally, without any writing; but this giving rise, as appears by the preamble of the act, to many fraudulent practices, which were endeavoured to be upheld by perjury and subornation of perjury, ~~and~~ the legislature deemed it expedient that certain contracts and agreements should be reduced into writing, and signed by the party to be charged therewith, or by his agent: and accordingly by the 4th section of the above statute it is enacted, "That from and after the 24th day of *June* 1677, no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

And by the 17th section it is further enacted, "That, from and after the said 24th day of *June*, no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall

shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

These two clauses, which are the only parts of the statute relating to the subject of this work, I propose to consider in the following order :

1. *Of Promises by Executors and Administrators.*
2. *Of Promises to answer for the Debt, &c. of another.*
3. *Of Promises in Consideration of Marriage.*
4. *Of a Contract or Sale of Lands.*
5. *Of Agreements not to be performed within a Year.*
6. *Of Contracts for the Sale of Goods.*
7. *Of the Contents and Signature, &c. of the Agreement required by the Statute ; and*

First, Of the contents and signature of a contract or sale of lands.

Secondly, In what cases the consideration must be stated.

Thirdly, Of the contents and signature of a contract for the sale of goods.

Fourthly, Of sales by *auction* and by *brokers*.

I. *Of Promises by Executors and Administrators.*

The first branch of the 4th clause of the statute enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate ; unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Now, to charge an executor or administrator upon any special promise to answer damages out of his own estate, it is not only necessary that the agreement should be in writing, and signed by the party to be charged therewith, or by his agent, as directed by the statute, but it is also necessary that the promise should be made on a good consideration : For the statute has made no other alteration
of

of the common law respecting agreements, than merely declaring that they shall be evidenced by writing; (a) and the common law, as we have seen in a former chapter, requires that every promise should be founded on a good consideration.

Thus, in the case of *Rann* and another, executors of *Mary Hughes*, v. *Isabella Hughes* administratrix of *J. Hughes*, in error, (b) the declaration stated that on the 11th June 1764, divers disputes had arisen between the plaintiff's testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiff's testator 983*l.* That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the said sum of 983*l.* was unpaid, "by reason of which premises the defendant, as administratrix, became liable to pay to the plaintiffs, as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay, &c." A general judgment was entered in the court of *King's Bench* against the defendant *de bonis propriis*. This judgment was reversed in the *Exchequer Chamber*; and a writ of error was afterwards brought in the house of lords, where, after argument, the following question was proposed to the judges by the Lord Chancellor, "Whether sufficient matter appeared upon the declaration to warrant, after verdict, the judgment against the defendant in error in her personal capacity;" upon which the Lord Chief Baron *Skyner* delivered the opinion of the judges to this effect:

"The statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable." His lordship showed that at common law the mere circumstance of the testator being indebted was not a sufficient consideration; and, after referring to the clause of the statute which relates to the present subject, he observed, "that the words were merely negative, and

(a) 1 Saund. 211. n. 2.

(b) 7 Term Rep. 350. n. a. et vide ante, chap. 2. p. 10.

“ that executors and administrators should not be liable out of their
 “ own estates, unless the agreement upon which the action was
 “ brought, or some memorandum thereof was in writing and signed
 “ by the party. But this does not prove that the agreement was still
 “ not liable to be tried and judged of as all other agreements, merely
 “ in writing, are by the common law, and does not prove the con-
 “ verse of the proposition that when in writing the party must be
 “ at all events liable.” He said “ that all his brothers concurred with
 “ him that in this case there was not a sufficient consideration to
 “ support this demand as a personal demand against the defendant,
 “ and that its being now supposed to have been in writing makes
 “ no difference. The consequence of which is that the question
 “ put to us must be answered in the negative.”

The word *agreement* in this section properly includes the consideration; as well as the promise; and therefore the consideration must form part of the written agreement. (c)

An executor before probate of the will is within the provision of this statute; but an administrator does not come within it, until he has actually obtained administration. (d)

2. *Of Promises to answer for the Debt, Default or Misconduct of another Person.*

By the second branch of the 4th clause it is enacted, “ That no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default or misconduct of another person; unless the agreement upon which such action shall be brought or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

The promise here mentioned must be on behalf of a third person originally liable to be sued; otherwise it is not within the statute.

(c) *Vide post, tit. In what Cases the Consideration must be stated.*

(d) *Vide Roberts on the Stat. of Frauds, 201.*

One of the leading cases on this part of the statute is *Buckmyr v. Darnall* (c), which was an action of *assumpsit*, wherein the plaintiff declared, that the defendant, in consideration that the plaintiff, at the request of the defendant, would let to hire, and deliver to one *Joseph English*, a gelding of the plaintiff's, to ride to *Reading* in the county of *Berks*, undertook and promised the plaintiff that the said *Joseph* would deliver the said gelding to the plaintiff.

Upon *non assumpsit* pleaded, this cause came to trial before *Holt*, Chief Justice, at *Westminster Hall*; and the counsel for the Defendant insisting, that the plaintiff ought to produce a note in writing of this promise within the statute of frauds; and the Chief Justice doubting of it, a case was made for the opinion of the other judges. And it was argued for the defendant, that this case was within the statute of frauds; for it was a promise to answer for the default and miscarriage of the person the horse was lent to; that the very letting out and delivery of the horse to *English*, implied a contract by *English* to re-deliver it, and he was bound by law so to do, and consequently the defendant was to answer for the default of another: that it had been ruled, that where an action will lie against the party himself, there an undertaking by a third person is within the statute; but that where no action will lie against the party himself, it is otherwise.

To this it was answered for the plaintiff, that here the credit was wholly given to the defendant; that the rule mentioned by the counsel on the other side must be understood, where an action does or does not lie against the party himself on the contract and not where an action does or does not lie against him upon collateral respects. And therefore in this case for an actual conversion, or for refusing to re-deliver the horse, *English* might be charged in *trover* or *detinue*; yet he being not chargeable upon the contract, the case was not within the statute. That this contract could not be said properly to be a promise to answer for the default or miscarriage of another, unless *English* were liable by the first contract.

(c) Lord Raym. 1085. 6 Mod. 243. S. C.

Upon the first motion and argument of this case, the three judges (f) against *Powys* seemed to be of opinion, that this case was not within the statute, because *Englisb* was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And *Powell*, justice, said, "that that rule, of what things shall be within the statute, is not confined to those cases only, where there is no remedy at all against the other, but where there is not any remedy against him on the same contract." This case is just like the case where a man says "send goods to such a one, and I will pay you;" that is not within the statute; for the seller does not trust the person he sends the goods to. So here, the stable-keeper only trusted the defendant, and an action on the contract will not lie against *Englisb*, but for a *tort* subsequent he may be charged in detinue, or *trover* and conversion, which is a collateral action.

Powys J. said, "that there was a trust to *Englisb*, for the very lending of the horse necessarily implies a trust to the person he is lent to, and consequently the defendant in this case is to answer for the default of another, and is within the statute."

Powell J. agreed, "that if a man should say, *lend J. S. a horse, and I will undertake he shall pay the hire of it; or send J. S. goods, and I will undertake he shall pay you; that those cases would be within the statute: and agreed with Powys, that if any trust were given to Englisb, then the case would be within the statute.*" But he, and the chief justice, and *Gould* held, that here was no credit given to *Englisb*; and the chief justice agreed with him, that if there had, this promise would have been but an additional security, and within the statute. And the chief justice said, "that if a man should say, 'let J. S. ride your horse to Reading, and I will pay you the hire,' that is not within the statute, no more than if a man should say, 'deliver cloth to J. S. and I will pay you.' He said also, that a bailee of an horse for hire is not bound to re-deliver him at all events, but if he be robbed of him without fraud in him, he is excused. The principal case, however, was adjourned; and on a subsequent day the chief justice delivered the opinion of the court: he said, "that

(f) *Holt* Ch. J. *Gould*. J. and *Powell* J.

" the

" the question had been proposed at a meeting of the judges, and
 " that there had been a great variety of opinions between them,
 " because the horse was lent wholly upon the credit of the de-
 " fendant; but that the judges of the court of King's Bench
 " were all of opinion that the case was within the statute. The
 " objection that was made was, that if *Engliſh* did not re-deliver
 " the horse, he was not chargeable in an action upon the promise,
 " but in trover, or detinue, which are founded upon the tort,
 " and are for a matter subsequent to the agreement. But I
 " answered, that *Engliſh* may be charged on the bailment in de-
 " tinue on the original delivery, and a detinue is the adequate
 " remedy, and upon the delivery *Engliſh* is liable in detinue,
 " and consequently this promise by the defendant is collateral,
 " and is within the reason, and the very words of the statute;
 " and is as much so, as if, where a man was indebted, J. S. in
 " consideration that the debtee would forbear the man, should pro-
 " mise to pay him the debt; such a promise is void, unless it be
 " in writing. Suppose a man comes with another to a shop to
 " buy, and the shop-keeper should say, "I will not sell him the
 " goods, unless you will undertake he shall pay me for them,"
 " such a promise is within the statute: otherwise, if a man had
 " been the person to pay for the goods originally. So here, de-
 " tinue lays against *Engliſh* the principal; and the plaintiff having
 " this remedy against *Engliſh* the principal, cannot have an action
 " against the defendant the undertaker, unless there had been a
 " note in writing."

So, if A. promises B, being a surgeon, that if he will cure D.
 of a wound, he will see him paid; this is only a promise to pay if
 D. does not, and, therefore, it ought to be in writing by the sta-
 tute of frauds. But if A. promise in such a case, that he will be
 B.'s paymaster, whatever he shall deserve, it is immediately the
 debt of A, and he is liable without writing (g).

A distinction is taken between a *conditional* and an *absolute* un-
 dertaking; as if A. promise to pay B. such a sum if C. does not,
 there A. is but a security for C. But if A. promise that C. will pay
 such a sum, A. is the principal debtor; for the act done was on
 his credit, and no way upon the credit of C. (h)

(g) *Per Holt Ch. J. in Watkins v. Perkins*, 1 *Ld. Raym.* 224.

(h) *Per Lee Ch. J. in Gordon v. Martin*, *Fitzg.* 303.

With respect, however, to *the sale of goods*, the general line now taken is, that, if the person for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute (i).

Thus, in the case of *Jones v. Cooper* (h), which was an action for goods sold and delivered: the facts were these: the defendant had frequently given written orders to the plaintiff to deliver goods of different kinds to one *Smith*, her son-in-law; in all of which she undertook to be answerable for the payment. These had been all punctually discharged. But the goods upon which the present question arose were delivered to *Smith*, in consequence of a *parol* order, and a *parol* promise by the defendant in these words; "I will pay you if *Smith* will not." That the undertaking was before the delivery of the goods; but that *Smith* was entered as the debtor in the plaintiff's books.

Lord Mansfield C. J. delivered the opinion of the court as follows:

"We are all of opinion upon the authority of the cases in the books, that the promise by the defendant in this case to pay, if *Smith* did not, is a collateral undertaking within the statute of frauds; and it is so clear that it would only be mispending time to go through the cases, or to say much about it,"

So, in the case of *Matson and another v. Wharam* (l), which was also an action for goods sold and delivered. the facts were as follow: In *January* 1785, the defendant *Wharam* applied to *Matson*, one of the plaintiffs, and asked him if he was willing to serve one *Robert Coulthard* of *Pontefract* with groceries; he answered they dealt with nobody in that part of the country, and did not know *Coulthard*; to which the defendant, *Wharam*, replied, if you do not know him, you know me, and *I will see you paid*. *Matson* then said he would serve him; and *Wharam* answered, he is a good chap, but *I will see you paid*. A letter was afterwards received by the plaintiffs from *Coulthard*, containing an order for goods to the amount of 7*l*. and the goods were afterwards sent to *Coulthard* accordingly. The plaintiffs made *Coulthard* the debtor for these

(i) *Per Buller J.* 2 Term Rep. 81. (k) Cowp. 227.
(l) 2 Term Rep. 80. *Matson v Wharam*

goods in their books. They afterwards applied to *Coulthard* for payment of the debt by letter, and receiving no answer, they then applied to the defendant, *Wharam*, who refused to pay the money.

There was no promise in writing made by the defendant: and the question for the opinion of the court was, whether the plaintiffs were entitled to recover.

The court were of opinion, that this was a collateral promise to pay in case *Coulthard* did not, and therefore within the statute; consequently the plaintiff was not entitled to recover.

So, in the case of *Anderson v. Hayman (m)*, which was an action of *assumpsit*: at the trial, the jury found a verdict for the defendant on these facts: the plaintiff was a woollen-draper in London, and employed one *Biffin* as a rider to receive orders from his customers in the country. The defendant meeting with *Biffin* at Deal, desired him to write to the plaintiff, requesting him to supply the defendant's son (who traded to the *West Indies*) with whatever goods he might want, on his, the defendant's credit, and at the same time said, "Use my Son well, charge him "as low as possible, and I will be bound for the payment "of the money as far as 800*l.* or 1000*l.*." *Biffin* accordingly wrote to the plaintiff the following letter; "Mr. *Hayman* of "this town says his son will call on you, and leave orders, "and he has promised me to see you paid, if it amounts "to 1000*l.* Mr. *William Pitcher* was also present as a witness."

"N. B. If deal for 12 month's credit, and pay in 6 or 8 "months, expects discount in proportion."—Soon after, the son received goods from the plaintiff to the amount of 800*l.* which were delivered to him in consequence of the above-mentioned order from the father. The son was debited in the plaintiff's books, and being applied to for payment, wrote an answer to the plaintiff as follows:

"Your favour of the 27th past has been forwarded to me "from *Ostend* by my clerk, in answer to which I can only say,

(m) 1 H. Bl. 120.

E 4

"that

“ that I understood your credit for the goods was 12 months,
 “ which was also mentioned by your rider to my father. I shall
 “ at this rate make you remittances for the different parcels as
 “ they come due, and remain, &c.

“ *Thomas Hayman, junior.*”

He afterwards became a bankrupt, and this action was brought against the father, to recover the value of the goods.

The court, on a motion for a new trial, were clearly of opinion, that this promise not being in writing, was void by the statute of frauds, as it appeared from the evidence of the letter of *Hayman* the younger, that credit was given to him, as well as the defendant.

But, in the case of *Harris v. Huntbach*, (n) which was an action for money lent; the question for the opinion of the court was, whether the promise was a *collateral* or *original* undertaking. It appeared from the evidence, that one *Davidson* coming to the plaintiff by the defendant's order, for money to pay workmen, the plaintiff refused to pay the money, unless the defendant would sign a receipt. Whereupon the defendant wrote the following note, viz. “ Mr. *Harris* at the request of the gardener, the work-
 “ men wanting money greatly, for the work at the woodhouses,
 “ this is to certify that it is my request you pay to Mr. *Davidson*,
 “ on the account of Master *Hillier*, for the workmen's use, the
 “ sum of 15*l.* as witness my hand, S. *Huntbach*,” and a receipt was given by the said *Davidson*, the gardener, to the plaintiff, on the plaintiff's paying him this 15*l.*

It also appeared that Master *Hillier*, at the time the money was advanced, was an infant, and that the woodhouses belonged to him.

The court determined that the note amounted to an *original* undertaking; and that there was nothing like a *collateral* request or promise.

Mr. Just. *Foster* said, “ The infant was not liable, and therefore it could not be a *collateral* undertaking. It was an *original* undertaking of the defendant.”

(n) 1 Bur. 373.

It is, however, in many cases very difficult to discover from the mere expressions of the party, to whom the credit was originally given; and therefore, in some instances, it is deemed necessary to take into consideration not only the expressions used, but the particular situation of the defendant at the time of his undertaking, and also the amount of the sum for which he is supposed to have made himself liable.

Thus, in the case of *Keate v. Temple*, (o) which was an action for goods sold and delivered, and work and labour. The principal facts proved at the trial were these: The plaintiff was a tailor and sloop-seller at *Portsmouth*, and the defendant the first lieutenant of his Majesty's ship the *Boyne*. When that ship came into port, the defendant applied to a third person to recommend a sloop-seller who might supply the crew with new cloaths, saying, "He will run no risk; I will see him paid." The plaintiff being accordingly recommended, the defendant called upon him, and used these words, "I will see you paid at the pay-table; are you satisfied?" He answered, "perfectly so." The cloaths were delivered on the quarter deck of the *Boyne*: slops are usually sold on the main deck: the plaintiff produced samples to ascertain whether his directions had been followed; some of the men said that they were not in want of any cloaths, but were told by the defendant that if they did not take them, he would punish them; and others, who stated that they were only in want of a part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers only. The cloathing of the crew in general was light, and adapted to the climate of the *West Indies*, where the ship had been last stationed. Soon after the delivery, the *Boyne* was burnt; and the crew dispersed into different ships. On that occasion, the plaintiff having expressed some apprehensions for himself, was told by the defendant "Captain Grey (the captain of the *Boyne*) and I will see you paid; you need not make yourself uneasy." After this the commissioner came on board the *Commerce de Marseilles*, in order to pay the crew of the *Boyne*; at which time the defendant stood at the pay-table, and having taken some money out of the hat of the first man who was paid, gave it to the plaintiff; the next man refused to part with his pay, and was immediately put in irons. The defendant then asked the commissioner to stop the pay of the crew, who answered that it could not be done.

(o) 1 Bos. and Pul. 158.

The learned judge, (p) before whom the cause was tried, in his direction to the jury said, "that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the defendant, as immediately responsible, the plaintiff was entitled to a verdict; but if they believed, that at the time when the goods were furnished, the plaintiff relied on being able, through the assistance of the defendant to get his money from the crew, they ought to find for the defendant." The jury found a verdict for the plaintiff 576*l.* 7*s.* 8*d.*

But the Court of *Common Pleas* afterwards directed a new trial upon the following grounds stated by Lord Ch. J. *Eyre*, in delivering the opinion of the court: "There is one consideration, independent of every thing else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is 576*l.* 7*s.* 8*d.*, and this against a lieutenant of the navy: a sum so large, that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or of the *shop-feller* to furnish the goods on his credit to so large an amount. I can hardly think that had the *Boyne* not been burnt, and the plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given the preference to the latter. The circumstance of this case creates some prejudice against the defendant, but which I think capable of explanation. There is some appearance of harshness in making the men purchase these cloaths against their inclination. But it was in evidence, that though they were pretty well clothed, yet their cloaths were adapted to a warm climate rather than to the service in which they were to be engaged. It was therefore the bounden duty of the officer to take some course to oblige the crew to purchase proper necessaries. We all know that a sailor is so singular a creature, so careless of himself, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know that he will risk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his situation may require. The whole of the imputation then on the defendant and Captain *Grey* amounts to this, that when the men were to be

(p) *Lawrence.*

cloathed, they wished them to be somewhat well dressed. I do not know but that this circumstance may have had some influence on the jury. But I do not feel the force of it when opposed to the weight of the evidence on the other side, so as to make the officer liable for so large a sum. From the nature of the case it is apparent that the men were to pay in the first instance: the defendant's words were, "I will see you paid at the pay-table; are you satisfied?" And the answer then was "perfectly so." The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, whether the stopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum? Considering the whole bearing of the evidence, and that the learned judge who tried the cause has not expressed himself satisfied with the verdict, I think this a proper case to be sent to a new trial.

In the cases which are now about to be mentioned upon the same branch of the statute, these points have been established, namely, if the person who makes the promise was in any respect liable *originally* to the debt, either *alone* or *jointly* with others, it does not come within the statute.

So, if there be any consideration moving to the party making the promise, it is out of the statute, though the debt of another be the original cause of the undertaking.

So, if it be part of the agreement that the original debtor shall be discharged, that is a sufficient consideration to support the undertaking of another to pay the debt, and the agreement need not be in writing: but if no such stipulation be made, and the original debt be permitted to subsist, the undertaking is merely *collateral*, and the agreement must be in writing.

So, where nothing more is stipulated for than an indulgence to the debtor, or that an action commenced shall be stayed; the undertaking of a third person to pay the debt is within the statute; for the original debt still continues, and the undertaking is but collateral. (9)

(9) Vide 1 New. Rep. C. B. 127.

So,

So, a verbal promise to pay the debt of another, and also to do some other act is void by the statute; the contract being *entire*.

Thus, in the case of *Stephens v. Squire*, (r) which was an action of *assumpsit* to pay 10*l.* and costs. The facts were these: an action had been brought against the defendant and two others; and the cause was carried down to be tried at the assizes; but the defendant promised, in consideration that the plaintiff would not prosecute the action, that he would pay 10*l.* and costs of suit. The question was whether this was a void promise by the statute of frauds, it not being in writing?

The court determined, that this could not be said to be a promise for another person, but for the defendant's own debt; and therefore not within the statute.

So, in the case of *Read v. Nash*, (s) the facts were these: *Tuack*, the plaintiff's testator brought an action of assault and battery against one *Johnson*. The cause being at issue, the record entered, and just coming on to be tried, the defendant *Nash* being then present in court, in consideration that *Tuack* would not proceed to trial, but would withdraw his record, promised to pay *Tuack* 50*l.* and the costs in that cause, to be taxed till the time of withdrawing the record, in which taxation all such sums of money were to be allowed as *Tuack* had paid and was liable to pay to his attorney and witnesses who attended the trial. *Tuack*, relying upon this promise, did withdraw his record, and no further proceeding was had in that cause. *Tuack* being dead, *Read*, his executor, brought an action upon this special promise, which was merely *verbal*, and not reduced into writing.

The case was twice argued at the bar; and, after time taken by the court to consider it, *Lcc*, Ch. J. delivered the opinion of the court as follows:

"The single question is, whether this promise which is confessed by the demurrer not to have been in writing, is within the statute of frauds and perjuries? that is to say, whether it be a promise for the debt, default, or miscarriage of another person?

(r) 5 Mod. 205. Comb. 362. S. C. (s) 1 Wils. 305.

And we are all of opinion that it is not, but that it is an original promise, sufficient to found an assumpsit upon against Nash, and is a lien upon Nash, and upon him only. Johnson was not a debtor; the cause was not tried, he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him if the cause had been tried, for any thing we can tell; he never was liable to the particular debt, damages, or costs. The true difference is between an original promise, and a collateral promise; the first is out of the statute, the latter is not when it is to pay the debt of another which was already contracted."

*Chater v
Beckett
JR. 204*

So, in the case of *Williams v. Leper*, (t) the facts were as follow: *Taylor*, a tenant of the plaintiff, being in arrear for rent, to the amount of 45*l.* for three-quarters of a year, and insolvent, conveyed all his effects for the benefit of his creditors. They employed *Leper*, the defendant, as a broker, to sell the effects, who accordingly advertised a sale. On the morning advertised for the sale, *Williams*, the landlord, came to distrain the goods in the house. *Leper* having notice of the plaintiff's intention to distrain them, promised to pay the arrear of rent, *if he would desist from distraining*. *Williams* on the faith of this promise, accordingly desisted. At the trial, a verdict was found for the plaintiff for 45*l.*; but the question for the opinion of the court was, whether this was such a special promise for the debt of another, as was within the statute of frauds?

The counsel for the plaintiff contended that this statute only meant to prevent *parol* promises, where there was no new consideration moving from the party making the promise to the party to whom it was made: that the legislature did not mean to prevent direct undertakings, but only collateral ones, for the debt, default, or miscarriage of others. Whereas here was a new consideration; for the goods of *Leper* were, at the time of the promise, liable to the landlord's distress. It was therefore, a direct undertaking for himself, and not for another. The plaintiff had a legal interest in these goods, prior to the bill of sale, and was deprived by the defendant of an advantage, which he could never have again. The property of the goods was in *Leper*, as a trustee for the creditors, at the time when he made this promise.

(t) 3 Bur. 1886. 2 Wils. 308. S. C

The counsel for the defendant insisted, that upon this declaration, coupled with the facts given in evidence, the plaintiff had no right to recover this 45*l.* For the declaration expressly charged 'that *Taylor* was indebted to the plaintiff in 45*l.* for three quarters of a year's rent, and that the defendant undertook to pay it;' which was directly within the words of the statute of frauds. That *Leper* was in possession of the goods of the tenant, who owed the plaintiff three-quarters rent; and being about to sell them, the landlord came to distrain for this rent in arrear; and *Leper* promised to pay it, if he would desist from distraining. He promised absolutely to pay it, and not to pay it out of the goods sold, or under any other restriction.

But Lord *Mansfield*, Ch. J. said, "the case has nothing to do with the statute of frauds. The *res gesta* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge: He entered to distrain; he had the pledge in his custody. The defendant agreed, 'that the goods should be sold, and the plaintiff paid in the first place.' The goods were the fund: the question was not between *Taylor* and the plaintiff. The plaintiff had a lien on the goods. *Leper* was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien: this has nothing to do with the statute of frauds. *Wilmot* and *Vates*, Justices; were of opinion, that this was an original promise; and Mr. *J. Aston* said, "he looked upon the goods to be the debtor; and that *Leper* was not bound to pay the landlord more than the goods sold for, in case they had not sold for 45*l.* The goods were a fund between both: and on that foot he concurred."

The principle upon which this case was determined was recognised in *Houlditch v. Milne*. (u) It was an action of *assumpsit* for the repair of carriages; and the facts in support of it were, that certain carriages which belonged to Mr. *Copey* had been sent by the defendant to the plaintiff's to be repaired, but the orders concerning them were given by the defendant. One of the carriages had been brought by Mr. *Copey* himself, and paid for by him; and the bill, which was the object of the action, contained a charge for repairs done to this carriage, and was made out in the name of *Copey*. When the carriages were repaired, the defendant sent an order to pack them up, and send them on board ship; the plaintiff upon this sent to him to know who was to pay for them: the

(u) 3 Esp. Rep. 86.

defendant said he had sent them, and he would pay for them. The carriages were afterwards packed up and sent on board ship, and the bill was made out and delivered to the defendant; he desired time to look over it; and when the plaintiff's clerk called a second time, he said the charges appeared very high; but desired the clerk to call in a few days, and he would settle it. Not having done so, the plaintiff's attorney waited upon him, when the defendant said, that he had been told that the bill was a most exorbitant one, and a fit subject to refer. However, he said, he had money to pay it, though he did not say, whether it was his own or *Copey's*. Upon these facts it was contended, on behalf of the defendant, that this case was within the statute of frauds. But Lord *Eldon*, Ch. J., before whom the cause was tried, said, "If a person obtained possession of a tenant's goods on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary; that such a case appeared to apply precisely to the one before him. The plaintiff had to a certain extent a lien upon the carriages, which he parted with on the defendant's promise to pay. His lordship therefore was of opinion that that circumstance took the case out of the statute, and consequently that the defendant was liable for the amount of the bill.

So, in the case of *Castling v. Aubert*, (v) where the following case was stated for the opinion of the Court of *King's Bench*.

The plaintiff was employed by one *E. P. Grayson* as his general agent; and, as an insurance broker, had effected for his use certain policies of assurance mentioned in the declaration, of the value of 3000*l.*; that the plaintiff was under acceptances for *Grayson*, for bills drawn by *Grayson* for his own accommodation; and that the plaintiff had a lien on the said policies to indemnify himself against his said acceptances. That a loss having happened on the policies of insurance, which the underwriters had agreed to pay, but which *Grayson* could not receive without having the policies to produce, the plaintiff was applied to, to give them up for that purpose to the defendant, into whose hands *Grayson* had at that time transferred the management of his insurance concerns. That some of the plaintiff's said acceptances for the use of *Grayson* being then

(v) 2 East. 325.

outstanding and unpaid, and particularly the bill for 181*l.* 1*s.* mentioned in the declaration then in the hands of one *Cator*, upon which writs had been sued out (though not then executed) against *Grayson* as the drawer, and the plaintiff as acceptor; the plaintiff refused to deliver up the policies of assurance, they being the only securities he had against his said acceptances, without an indemnity; and that thereupon a meeting was held between the plaintiff and defendant and *Grayson*, at which it was verbally agreed between the parties that the defendant should pay into the hands of a banker 712*l.* 13*s.* 6*d.*, to answer in part certain other acceptances of the plaintiff's, exclusive of the bill for 181*l.* 1*s.*; and that the plaintiff should provide 241*l.* 14*s.* 6*d.* towards paying one of his acceptances for 350*l.*; and that the defendant should pay the bill of 181*l.* 1*s.* and the costs of the action which had been brought thereon against *Grayson*, amounting together to 202*l.*; and that thereupon the said policies should be delivered up to the defendant. That in pursuance of this agreement the defendant paid into the banker's hands 712*l.* 13*s.* 6*d.* and the plaintiff delivered up the policies to the defendant. That the defendant received from the underwriters the amount of other subscriptions on the policies so delivered up to him by the plaintiff. That the defendant was afterwards called upon by the attorney of *Cator* to pay the said 202*l.* for the debt and costs on the bill in *Cator*'s hands, but refused to do so; nor had he paid it at the time this action was commenced; and that in consequence of such refusal the plaintiff was arrested at the suit of *Cator*, as acceptor of the said bill of exchange, and sustained damages thereby to the amount found by the jury, viz. 25*l.* The question for the opinion of the court was, whether the promise of the defendant to pay the said 202*l.* due from *Grayson* for the said debt and costs, on having the said policies of insurance delivered to him, was void under the statute of frauds; or whether he were liable by reason of the plaintiff's parting with the possession of those policies upon which the plaintiff had a lien, and which were so deposited with the defendant?

The Court were of opinion, that this was not a promise for the debt or default of another within the statute of frauds, but an *original* undertaking.

Lord *Ellenborough*, Ch. J. said, "I am clearly of opinion, that this is neither an undertaking for the debt, default or miscarriage of another within the statute. It could not be for the *debt*, but rather for the *credit* of another; for when the promise was made,

no

no debt was incurred from *Grayson* to the plaintiff; therefore, if at all within the statute, it must be for the default or miscarriage of another. But see what the case is: the plaintiff who was *Grayson's* broker, had policies of insurance in his hands belonging to his principal, which were securities on which he had a lien for the balance of his account; and on the faith of these he agreed to accept bills for the accommodation of his principal. One of these bills became due, and actions were brought against the plaintiff as acceptor, and against *Grayson* as drawer: and it was desirable that the policies should be given up by the plaintiff to the defendant, in order to enable the money for the losses incurred to be received from the underwriters; the defendant undertaking, upon condition the policies were made over to him, to settle the acceptances due, and to lodge money in a banker's hands for the satisfaction of the remainder, as they became due. The defendant then procured from the plaintiff the securities upon the faith of this engagement; in entering into which he had not the discharge of *Grayson* principally in his contemplation, but the discharge of himself. That was his moving consideration, though the discharge of *Grayson* would eventually follow. It is rather therefore a purchase of the securities which the plaintiff held in his hands. This is quite beside the mischief provided against by the statute; which was that persons should not by their own unvouched undertaking without writing charge themselves for the debt, default, or miscarriage of another. In the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; and the same objection might be made there: but the moving consideration is the discharge of the party himself, and not of the rest, though that also ensues. Upon the whole therefore I agree with the decision in *Williams v. Leper* (u) to the full extent of it: I agree with those of the judges who thought the case not within the statute of frauds at all; and I also agree with the ground on which Mr. Justice *Ashon* proceeded, that the evidence sustains the count for money had and received."

So, in the case of *Anstey v. Marden*, (w) which was an action of *assumpsit* tried before Sir *James Mansfield*, Ch. J. and, upon the trial, it appeared in evidence, that the defendant being in distressed circumstances, the plaintiff and three other cre-

(u) *Ante*, 61.

(w) 1 New Rep. C. B. 124.

... met, and finding that he could only pay ... they came to an agreement to accept from ... the defendant's father-in-law, 10s. in the pound in ... the debts due to them from the defendant, and to ... debts to the said *T. Weston*; and an agreement was accordingly prepared for that purpose.—The three other creditors signed this agreement, and received their respective sums of money, to the amount of 10s. in the pound from *T. Weston*, and the plaintiff at one time authorised *Greenwood* (one of the three creditors who signed) to sign for him when he signed for himself; but *Greenwood* having omitted so to do, the plaintiff revoked his authority, and refused to execute the agreement, or accept the 10s. in the pound on his debt. On behalf of the plaintiff it was objected, that *Weston's* undertaking to pay 10s. in the pound in discharge of the defendant's debt was void by the statute of frauds, no agreement by which *Weston* could be charged having been signed by him, and therefore the plaintiff's undertaking to accept 10s. in the pound was *nudum pactum*. But the Chief Justice ruled that the undertaking of *Weston* was not within the statute of frauds, being an undertaking to pay a debt of a new description, viz. 10s. in the pound, in consideration of *Marden* being discharged, and not an undertaking to pay the debt of *Marden*. Accordingly a verdict was found for the defendant, who had paid into court the amount of the 10s. in the pound on the plaintiff's debt. And the Court of Common Pleas afterwards, upon a rule to shew cause why there should not be a new trial, confirmed his Lordship's opinion, and determined, that this agreement was not within the statute; it not being a collateral promise to pay the debt of another, but an original contract to purchase the debts.

Sir James Mansfield, Ch. J. said, "At the trial of this cause, it was objected on the part of the plaintiff, that the promise by *Weston* was a promise within the statute of frauds, and therefore no bar to the plaintiff's demand. It appeared to me doubtful how far the promise in this case could be deemed to be within the statute; and it rather struck me that being a promise to pay only 10s. in the pound, and not to pay the whole debt, it was an original agreement, and therefore was not within the statute. I did not see how one person could undertake for the debt of another, when the debt for which he was supposed to undertake, was discharged by the very bargain. No cases, however, were at that time cited. We have now been considering all the circumstances of the case, and

and the question is, whether justice will not be done by not allowing the plaintiff to take more than what the strictest rule of law will entitle him to? The facts were shortly these. The defendant was upon a brink of a bankruptcy; some of his creditors met to consider what should be done, and his effects being found only sufficient to pay 7s. 6d. in the pound, the creditors agreed to accept 10s. in the pound from *Weston* in full satisfaction of their debts, and undertook to assign their debts to him. The only object of the deed was the assignment of the debts; and *Weston* was to pay 10s. in the pound as the price of those debts. After this the plaintiff went out of town, and some of the creditors accepted 10s. in the pound, and assigned their debts to *Weston*. The plaintiff thought proper, first to deny his agreement, and then to insist on his right to change his mind and refuse to execute the deed. He had a right to change his mind, but in point of morality and sound honesty his conduct was extremely bad. It was equivalent to obtaining a promise from *Marden* privately for payment of the whole debt, after agreeing with the rest of the creditors, to take a part only. He now comes here to set aside the verdict, in order to put into his pocket the other part of the debt for his own benefit, to which *Weston* is entitled. Supposing the promise by *Weston* to be a good promise in law, the plaintiff cannot recover the original debt due from the defendant to himself, inasmuch as he has agreed to accept 10s. in the pound in satisfaction of that debt, and to assign it to *Weston*, who is contented with the verdict. The plaintiff has clearly been guilty of very harsh treatment towards the defendant; and I do not think the court called upon to alter the verdict, as a favour to him.—He has acted altogether contrary to honour and justice, and I think the verdict ought to stand. I would not have it supposed that I mean to throw any doubt upon the decisions which have been cited respecting the statutes of frauds. The case of *Chater v. Beckett*, (*) certainly decides that a mere promise, such as that before us, would be within the statute; and indeed, upon general principles, no one can wish to restrain the operation of the statute of frauds. The benefits of that statute are much more apparent to those who are conversant with the practice of the court of Chancery, than those who have only seen the practice of the courts of common law. But upon the whole, it appears to me that the agreement by *Weston* amounted to a purchase of the plain-

(*) *Post.* 70.

... the application for a new trial ought not to be

... to pay the debt of a third person in consideration
... is within the statute, and must therefore be

... in the case of *Fish v. Hutchinson*, (y) which was an action
... the plaintiff declared, that whereas one *Vickers* was
... to him in a certain sum of money, and had com-
... an action for the same; the defendant in consideration
... the plaintiff would stay his action against *Vickers* promised to
... plaintiff the money owing to him by *Vickers*. To this there
... was a demurrer and joinder in demurrer.

For the defendant it was insisted, that this being a promise to
pay the debt of another person, was void by the statute of frauds
and perjuries.

It was answered for the plaintiff, that this was an original con-
tract between the plaintiff and defendant, so not within the statute;
and the case of *Read v. Nash*, (z) was cited as in point.

But *per totam curiam*. "This case at bar is very clearly within
the statute, for here is a debt of another person still subsisting, and
a promise to pay it: and it is not like the case of *Read v. Nash*,
for that was an action of assault and battery brought by the plain-
tiff's testator against one *Johnson*; the cause was at issue, the re-
cord of *nisi prius* entered, and just coming on to be tried, when
the defendant *Nash*, being present in court, in consideration that
plaintiff's testator would not proceed to try his cause, but would
withdraw his record, promised to pay him 50*l.* and costs to be
taxed in that suit; so in that case there was no debt of another, it
being an action of battery, and it could not be known before trial
whether the plaintiff would recover any damages or not; but in
the present case here is a debt of another still subsisting, and a pro-
mise to pay it."

So, a promise by the indorser of a dishonoured note, to indem-
nify the holder if he will proceed to enforce the payment against
the other parties thereon, must be in writing, otherwise it is void.

(y) 2 Wils. 94. Stra. 873. S. P. (z) 1 Wils. 305. *et ante*, 60.

Thus, in the case of *Winckworth v. Mills*, (a) which was an action of *assumpsit* for money paid, laid out, and expended to the defendant's use, with a count against him as indorser of a promissory note; the report states that the plaintiff was indorsee of one *Brough*, who was the indorsee of the defendant, who was himself the indorsee of *Taylor* and son of a promissory note drawn by one *Sharp* in favour of *Taylor* and son, for 60*l.* payable three months after date, at *Taylor's* house. When the note became due, the plaintiff's clerk called for payment of it at *Taylor's* house, but by mistake left it behind; he immediately returned and informed *Taylor* and son of the circumstance, and demanded the note, but they denied having it, and it was considered as lost.

The plaintiff and *Brough* immediately waited on the defendant, and informed him of the circumstance. Whereupon he furnished them with a copy of the note, and promised if they would endeavour to recover the amount of it from *Taylor* and son, or from *Sharp*, that he would indemnify them. They applied to *Sharp*, whom they found was a man of no substance. They afterwards applied to *Taylor* and son, and they on being threatened paid 30*l.* in part, and gave a new security by a note for the remaining 30*l.* But this last note not being paid when due, an action was brought on it against *Taylor* and son, and a judgment obtained by default; they, however, brought a writ of error on the judgment, and then became bankrupts. Upon this *Winckworth*, the plaintiff, brought this action to recover from *Mills*, the defendant, the expenses he had been put to in endeavouring to recover the money from *Taylor* and son, on *Mills'* promise of indemnifying him, and added a count against him as indorser of the original note.

Lord *Kenny* asked if there had been any note in writing from *Mills* to the plaintiff, promising to indemnify him in the manner stated. He was answered in the negative; but it was contended that it was not necessary, *Mills* the defendant being himself a party to the note, and to be benefited by the proceedings against *Taylor*.

His Lordship then added, " that he was of opinion the action could not be supported, to recover that part of the demand claimed under the promise of indemnity; that it was a promise

(a) 2 Esp. Rep. 484.

for the debt and default of another, and so could not under the statute of frauds be maintained without a note in writing; but as to the unpaid part of the original note, the plaintiff was entitled to recover it."

So, a *parol promise to pay the debt of another, and also to do some other act*, is void by the statute; *the contract being entire.*

Thus, in the case of *Chater v. Beckett*, (b) which was an action of assumpsit on a special agreement, and for money paid, tried before Lord *Kenyon*. At the trial, the plaintiff's counsel stated, that the facts of the case were these: that the plaintiff, who had struck a docket against *J. Harris*, was induced not to prosecute the commission of bankrupt, but to sue him at law for the recovery of his debt, and having sued out a writ against him, some of *Harris's* creditors were anxious to take a composition for their debts, provided all of them would agree to it; and to effect this scheme the plaintiff called several meetings of *Harris's* creditors, at the last of which a composition of 10s. in the pound was proposed, which all the creditors, except the plaintiff, consented to take: but as the plaintiff had been put to great expences, in striking the docket against *Harris*, suing out a writ, and calling the creditors together, he would not agree to take that composition unless those expences were also paid, in consequence of which the defendant promised to pay those expences, and to accept bills drawn by the plaintiff on him to the amount of the composition. The plaintiff accordingly drew bills on the defendant to that amount, which the latter accepted and paid: but the defendant refusing to pay the plaintiff's expences, amounting to 20*l.* 13*s.* the plaintiff paid them to the attorney, and brought this action to recover the same from the defendant on his undertaking. But this undertaking not being in writing, Lord *Kenyon* was of opinion that the case came within the statute of frauds, and nonsuited the plaintiff on his opening; referring to the case of *Read v. Nash*. (*)

A rule *nisi* was afterwards obtained to set aside the nonsuit; and when the case was called on, the plaintiff's counsel said,

(b) 7 Term Rep. 201. See also *Coke v. Toms*, Anstr. 420. *Lee v. Barber*, Ib. 425.

(*) 1 Wils. 305. *et ante*, 60.

that

that even though this were a case within the statute of frauds, the plaintiff might recover on the general count for money paid to the use of the defendant.

But the court were of opinion against the plaintiff on both points, and decided that the case was within the statute.

Lord *Kenyon* Ch. J. said, "When this cause came on to be tried, I referred to the case of *Read v. Nash*, to show that this was a case within the statute of frauds: and though the court ruled that that case itself was not within the statute, what was said by Lord Chief Justice *Lee* is decisive to show that this promise is void by the statute. That was an action not founded on any debt, but for an assault; and he said "*Johnson* was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him, if the cause had been tried; he never was liable to the particular debt, damages, or costs." Whereas in this case *Harris* was indebted to the plaintiff, and the defendant undertook to pay part of that debt, and to pay certain other expences. The promise therefore was certainly void in part by the statute; and the agreement being entire, the plaintiff cannot now separate it, and recover on one part of the agreement, the other being void. And if that agreement be void, there is an end of the case; for where there is an express promise, another promise cannot be implied. I lament extremely that exceptions were ever introduced in construing the statute of frauds; it is a very beneficial statute, and if the courts had at first abided by the strict letter of the act, it would have prevented a multitude of suits that have since been brought."

Lawrence J. said, "It is clear that the plaintiff cannot recover on the special counts. Then the question is, whether on the transaction, as stated, he can support the general count for money paid to the use of the defendant? The defendant's was not a promise to pay the attorney, but to pay the plaintiff the expences that he had incurred: but the plaintiff was originally liable to pay these expences to his own attorney; and when he paid them, he only paid his own debt; therefore this cannot be considered as money paid to the use of the defendant."

It should be observed, that in all those cases which come within that part of the statute we have now been considering, the consideration,

consideration, as well as the promise, must be stated in the agreement, otherwise it will be void. (c)

3. *Of Promises in consideration of Marriage.*

In the next branch of the fourth clause of the statute of frauds, it is enacted, that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Very soon after the passing of the act it was holden, that this branch of it extended as well to mutual promises to marry, as to an agreement in consideration of marriage.

Thus, in the case of *Philpott v. Waller*, (d) which was an action of *assumpsit*, in consideration that the plaintiff, at the request of the defendant, would consent to take him to be her husband, the defendant promised to take her to be his wife; and that the plaintiff was ready, and offered to take the defendant to be her husband, but he refused. This promise was made without any writing; it was therefore contended that it was void by the statute; but it was answered, that this was no promise within the statute, which was only intended of promises for payment of money upon marriages, and not of promises to marry.

But the court resolved, that this promise is directly within the words, and not out of the intent of the statute; because the promise is, that in consideration the one would marry the other, the other would marry him, and therefore it is a promise in consideration of marriage.

This construction of the statute, however, was afterwards much doubted, and in some cases denied; (e) and it is now finally settled, that mutual promises to marry need not be in writing by the statute of frauds.

(c) Vide *post*, tit. *In what Cases the Consideration must be stated*.

(d) 3 Lev. 65. (e) Vide Lord Raym. 387.

Thus,

Thus, in the case of *Cork v. Baker*, (f) the plaintiff declared, that in consideration she promised to marry the defendant, he promised to marry her at his father's death, who was since dead, but the defendant refused so to do, and had afterwards married A. B.

The defendant moved in arrest of judgment, that this *parol* promise was not good in law. But, after argument, it was held, that this was not within the statute of frauds and perjuries, which relates only to contracts in consideration of marriage; and that the case in 3 Lev. 411. (g) had been contradicted by later resolutions.

A *parol* agreement to pay money, or make a settlement in consideration of marriage, if not reduced into writing, previous to the marriage, is void; and a subsequent marriage is not a part execution of such an agreement to take it out of the statute. But a subsequent marriage and *settlement* has been held sufficient to prevent the statute operating upon such *parol* promise. (b)

Letters from parents, or persons in *loco parentis*, containing promises of provisions, have been a frequent subject of adjudication, and wherever they have been explicit in their terms, and the subject matter of the promise has been reduced to sufficient certainty, they have been held to satisfy the statute. Thus, in a case determined a very few years after the statute was passed, where a father wrote a letter, signifying his assent to the marriage of his daughter with J. S. and that he would give her 1500*l.*, and afterwards, by another letter, upon a further treaty concerning the said marriage, went back from the proposals of his first letter; and again, at some time after, declared that he would agree to what was proposed in his first letter; the letter was held a sufficient promise in writing, within the statute of frauds, and that the last declaration had set up the terms of the first letter again. (i)

But, in the case of *Ayliffe v. Tracy* (k) where it is stated that the plaintiff courted one of the daughters of Sir Thomas Haslewood,

(f) *Stra.* 34. (g) This must be intended for 3 Lev. 65. the case in 3 Lev. 411. being upon marriage brokerage bonds, and not at all relating to the statute of frauds.

(b) *Montacute v. Maxwell*, 1 P. Wms. 618. *Stra.* 236. S. C. See also 1 Vez. jun. 199. 4 East. 201.

(i) Vide 2 Vent. 361. Prec. Chan. 560. 2 Vern. 200. 202.

(k) 2 P. Wms. 65. This case is very differently stated in 9 Mod. 3.

and treated with the father about the marriage; the father consented to the marriage, and wrote a letter to his daughter, intimating that he had met the plaintiff Mr. *Ayliffe*, and had agreed to give him as a portion 3000*l.* which the plaintiff (he said) seemed fully to assent to, and that they were to meet the next day, when the affair was to be fully concluded; and he subscribed his name to the letter.

Accordingly they met, and agreed to the marriage, and the father gave money to the daughter to buy her wedding-cloaths, and the wedding-day having been appointed, the father died before that day, having made his will long before this treaty of marriage, and given his daughter only 2000*l.*

The daughter did not show this letter to the plaintiff, her intended husband, whom she afterwards married, and the 2000*l.* legacy was paid to the plaintiff, the husband; but he did not, neither was he required to make any settlement on his wife, but was a merchant and freeman of *London*.

The Lord Chancellor (*l*) said, "This being no more than a communication, has no ingredient of equity; the husband made no settlement; he did not know of this letter, it being wrote to the daughter, and therefore cannot be supposed to have married in consequence of the letter."

Then he accepted of the 2000*l.* legacy as the portion, and at that time demanded no more, and the other daughter had but 1500*l.* portion."

But, where A. by letter promises to give such a fortune with his daughter to B., and B. marries the daughter on the encouragement of this letter; this is sufficient to bring the agreement out of the statute of frauds; and B. shall recover, because the agreement is executed on his part as far as it can be, and can never be undone after. (*m*)

(*l*) *Macelesfield*.

(*m*) 2 Eq. Cas. abr. 49. See also 2 Vern. 322. 1 Vez. 297.

4. *Of a Contract or Sale of Lands, &c.*

In another branch of the fourth section of the statute, it is enacted, " that no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized,

Upon this part of the statute it is said, (n) that *Treby*, Ch. J. reported to the other justices of the *Common Pleas*, that it was a question before him at a trial at *nisi prius*, at *Guildhall*, whether the sale of timber growing upon the land ought to be in writing by the statute of frauds, or might be by *parol*? And he was of opinion, and gave the rule accordingly, that it might be by *parol*, because it is but a bare chattel. And to this opinion *Powell* Justice agreed,

So, in the case of *Poulter v. Killingbeck*, (o) which was an action of *indebitatus assumpsit*. The first count of the declaration was " for 20*l.* for the moieties of divers crops of wheat, and cole-seed, by the plaintiff before that time sold to the defendant, and by the defendant, in consequence of such sale before then had, reaped and taken to and for his own use and benefit." The second count was on a *quantum meruit*, " for that the plaintiff had permitted and suffered the defendant to depasture, eat up, and consume with his cattle the moiety of a certain other crop of cole-seed." There was also a count for money had and received.

The cause was tried before *Ashburß*, justice, and it appeared that the plaintiff being possessed of certain pieces of fen-land, which he was desirous of having put into a state of cultivation, made a verbal declaration to let them to the defendant without rent, who was to plough, dress, and sow them for two successive crops, and in lieu of rent, to allow the plaintiff a moiety of the crops. While the crops of the second year were on the ground, an appraise-

(n) Lord Raym. 182.

(o) 1 Bos. and Pul. 397.

ment of them was taken for both parties, and the value ascertained. The defendant having afterwards refused to pay a moiety of the value, this action was brought. It was contended, at the trial, that a special agreement for a moiety of the crops having been proved, this action of *indebitatus assumpsit*, for a moiety of the value, could not be supported: and also that the agreement itself was within the statute of frauds; first, because it related to land; and secondly, because it was not to be executed within a year; and that it ought therefore to have been in writing. A verdict was found for the plaintiff subject to the opinion of the court on the first objection.

Eyre, Ch. J. said: "The circumstance of the appraisement seems to put an end to this point: It is true that as the case originally stood, the plaintiff had a claim to a moiety of the produce of the land under a special agreement: but that special agreement was executed by the appraisement. It had been agreed that the moiety of the crops was the property of the plaintiff; but he being willing that the defendant should keep them, a surveyor was appointed to settle the price between them. The circumstance of the appraisement affords clear proof that the plaintiff sold what the defendant had agreed was his: and the price being ascertained, brings this to the case of an action for goods sold and delivered. It is unnecessary to state a special agreement, which has been executed, where the action arises out of something collateral to it."

Buller J. "If no appraisement had taken place, the objection to the action in this form must have prevailed. But that circumstance is decisive. With respect to the point made at the trial, on the statute of frauds, this agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops."

But a contract with the owner of a close for the purchase of a growing crop of grass to be mown and made into hay by the vendee, if not in writing, is within the statute,

Thus, in the case of *Crosby v. Wadsworth*, (p) which was an action of *trespass*. At the trial a verdict was found for the plaintiff,

(p) 6 East, 602. See also *Waddington v. Briflow*, 2 Bos. and Pul. 452. *et vide post*, chap. V. where it was held, that a sale of hops not gathered, is not within the exception of the stamp act relating to agreements for the sale of any goods, wares, and merchandises.

subject to the opinion of the court on the following case. The declaration stated, that the defendant on the 9th of *July* 1804, and on divers other days, &c. with force and arms broke and entered a certain close whereof the said plaintiff was then lawfully possessed, and cut down the plaintiff's grass, then growing in the said close, and also took and carried away the same, and also the plaintiff's hay then being on the said close, and disposed thereof to his own use. The facts were that on the 6th of *June* 1804 the plaintiff agreed by *parol*, with the defendant for the purchase of a standing crop of mowing grass, then growing in a close of the defendant's, for 20 guineas. The grass was to be mowed and made into hay by the plaintiff; but the parties did not absolutely fix upon any time at which the mowing was to be begun. No earnest was given, nor, was any note, memorandum, or writing, signed by either of the parties or by any person on their behalf, nor was possession of the close given to the plaintiff, but was retained by the defendant. On the 2d of *July* the defendant told the plaintiff he should not have the grass; and afterwards on that day, sold it to *W. Carver* for 25 guineas. The plaintiff on the 12th of *July* tendered to the defendant 20 guineas for the crop, which the defendant refused to accept. The plaintiff went next morning to the defendant's close, and finding the gate unlocked, sent in a person to mow the grass, who cut near half of the close. On the evening of the 15th the defendant brought a letter from his attorney to the plaintiff, forbidding him to enter the close, and discharging him from mowing the grass. A lock was then fixed upon the gate by the defendant, and *Carver*, by his directions, carried away the grass which had been mowed, and afterwards cut and carried away the remainder of the crop. The question for the opinion of the court was, whether the plaintiff were entitled to recover.

After the case had been fully argued, and the court had taken time to consider it, Lord *Ellenborough* Ch. J. delivered the opinion of the court as follows :

“ As the plaintiff appears to have been entitled (if entitled at all under the agreement stated) to the exclusive enjoyment of the crop growing on the land during the proper period of its full growth, and until it was cut and carried away, he might in respect of such exclusive right maintain trespass against any persons doing the acts complained of in violation thereof. This brings us to the

the question, whether the plaintiff had under the agreement and circumstances stated any legal title to this growing crop at the time when the injury complained of was done; or whether his supposed title thereto was not wholly void; as being created by *parol*; under any, and which of the provisions in the statute of frauds, or on any, and what other account? And in the outset I feel myself warranted in laying wholly out of the case the provision contained in the 17th section of this statute as not applicable to the subject matter of this agreement, which cannot be considered in any proper sense of the words as a sale of *goods, wares, or merchandizes*; the crop being at the time of the bargain, (and with reference to which time I agree with Mr. Justice *Heath* in *Waddington and Bristow*; 2 Bos. and Pull. 452, that the subject matter must be taken,) an unsevered portion of the freehold, and not moveable goods or personal chattels. The next question then is, is it a "lease, estate, interest, of freehold or term of years, or an uncertain interest of, in, to, or out of lands, created by *parol*," within the meaning of the first section, so as to be void as *not having been put in writing*? I think, collecting the meaning of the first by aid derived from the language and terms of the second section, "and the exception therein contained, that the *leases, &c.* meant to be vacated by the 1st section must be understood as *leases* of the like kind with those in the 2d section," but which conveyed a *larger interest* to the party than *for a term of three years*, and such also as were made *under a rent reserved thereupon*; neither of which circumstances are to be found in this agreement for the growing crop. Supposing it, therefore, on this construction of the statute, not vacated as a lease, &c. under the 1st section, it then comes to be considered under the 4th section of the act, whether this purchase of the growing crop be "a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them?" and if it be so, then whether this action of trespass be "an action brought to charge the defendant on such contract or sale," within the meaning of the statute? Upon the first of these questions, I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of *an interest in*, or at least, an interest *concerning lands*. But the statute does not expressly and immediately vacate such contracts, if made by *parol*; it only precludes the bringing of actions to enforce them by charging the contracting

contracting party or his representatives, on the ground of such contract and of some supposed breach thereof; which description of action does not properly apply to the one brought, viz. a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this *interest in or concerning land* may not be in itself wholly void under the statute, merely on account of its being by parol; so that if the same had been executed the parties could have treated it as a nullity; yet, being executory, and as for the non-performance of it no action could have been by the provisions of the 4th section maintained, we think it might be discharged before any thing was done under it which could amount to a part execution of it. And this discharge, unfortunately for the plaintiff, appears to have been given in the present instance, on the 2d July, by the countermand and refusal of the defendant of that date, before the plaintiff had done any one act towards carrying the agreement into effect. On this latter ground therefore, viz. that this parol executory contract, supposing it to have been otherwise valid, was competently discharged by parol, we feel ourselves obliged to say that the plaintiff is not entitled to recover. The case suggested at the close of the argument of *Poulter v. Killingbeck*, (p) has no material application in favour of the plaintiff. It was there objected that the agreement was within the statute of frauds, *first*, as relating to land; *secondly*, as not being to be executed within a year. As to the first objection, the contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce no longer did so; it was originally an agreement to render what should have become a chattel, i. e. part of a severed crop in that shape, in lieu of rent, and by a subsequent agreement it was charged to money instead of remaining a specific render of produce. So that one wonders rather how it should ever have been thought an interest in land, than that it should have been decided not to be so. The subsequent agreement relieved the case also from the second objection."

All *freehold rents*, of whatever denomination, are within the operation of this clause, as coming under the word *tenements*. (q)

(p) Ante, 75. (q) Vide 2 Ves. jun. 232. See also *Roberts on the Statute of Frauds*, 126, 7.

So,

So, also a *share of the New River water* comes under the description of "*land or tenements.*" (r)

It is observed, (s) "that the word *tenements,*" has in law so extensive an import, that it may be questioned whether the super-added words in this clause of the statute has enlarged the operation of the statute. It was the only word which the statute of *Westminster*, 2, or 13. Ed. 1. Cap. 1. *de donis conditionalibus*, used in expressing the subjects of its provisions. And Lord Coke, in speaking of the statute *de donis*, observes that the word *tenement*, therein includes not only all corporate inheritances, which are, or may be *holden*, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure; as rents, cistovers, commons, or other profits whatsoever, granted out of lands, or uses, offices, or dignities, which concern lands, or certain places, and these may all be entailed within the statute, because they favour of the reality. Such things too whereof a wife is dowable, as the profits of a stallage, market, or fair, a dove-house, or piscary, which have no connection with the soil, as also a presentation to an advowson, tithes, the profits of courts, fines, and heriots, seem all to be included within the compass of this clause of the statute.

But all equitable liens on land are out of the statute.

Thus, in the case of *Russell v. Russell*, (t) where a lease had been pledged by a person, who afterwards became a bankrupt, to the plaintiff, as a security for a sum of money borrowed; and the holder brought his bill for the sale of the leasehold estate, though it was insisted by the counsel, that the plaintiff's claim was opposed by the 4th section of the statute of frauds, as an attempt to charge lands without writing, yet an issue was directed by the Lords Commissioners, to try with what intention the lease had been delivered; and Lord Loughborough seemed to treat the contract as already executed in equitable contemplation, and not as a thing to be performed, observing that the court had nothing to do but to supply the legal formalities. Upon the trial, the jury found that the lease was deposited as a security; and the cause afterwards

(r) 2 P. Wms. 127. (s) *Roberts on the Statute of Frauds*, 427.

(t) 1 Bro. Ch. Rep. 269. See also *Roberts on the Statute of Frauds*. 188.

coming on upon the equity reserved before Lord *Thurlow*, Chancellor, the court ordered the lease to be sold, and the plaintiff to be paid his money.

Upon this branch of the statute it has also been determined, that though the agreement be not in writing, yet if there has been a part-performance of the contract, this circumstance takes the case out of the statute. But the part-performance must be such an act, as would not have been done but on account of the agreement, or unless the party had not considered himself, or been treated as owner. The part-performance must also appear to be acts done with a direct view to perform the agreement; and they must be such as are prejudicial to the party performing them.

Thus, in the *Earl of Aylesford's* case, (u) there was a parol agreement for a lease of twenty-one years, upon which the lessee entered, and continued in possession for six years, and then the Earl brought a bill against him, to oblige him to execute a counterpart for the residue of the term. The lessee pleaded the statute of frauds and perjuries, which, on argument, was over-ruled, the agreement being in part carried into execution.

So, in *Pyke v. Williams*, (v) where possession of an estate having been delivered by the seller to the purchaser, who refused to complete his purchase, and to give a colour to his possession, procured an assignment of a mortgage which he antedated; the possession delivered, was held to be an act of part-performance; and accordingly the Lord Keeper decreed *Pyke* to go on with his purchase.

So, payment of part of the purchase money has been holden to be such a part-performance, as to take a case out of the statute.

Thus, in *Lacon v. Mertins*, (w) it was distinctly laid down by Lord Hardwicke that payment of money had been always held in a court of equity as a part-performance.

(u) Strá. 783.

(v) 2 Vern. 455. See also *Lockey v. Lockey*. Prec. in Chan. 519. *Seagood v. Meale*, ib. 561. S. P. See also *Buckmaster v. Harrop*, 7 Ves. jun. 341. *Willis v. Stradling*, 3 Ves. jun. 378.

(w) 3 Atk. 4. 1 Vez. 82. See also *Hollis v. Whiting*, 1 Vern. 151. and *Dean v. Bard*, and *Hollis v. Edwards*, 1 Vern. 159. as to laying out Money in Repairs, &c.

There is, however, a case which has a contrary tendency: Thus, (x) where A. agreed with B. to make him a lease for 21 years, rendering rent, and B. paying to A. 150*l.* fine. B. paid 100*l.* in part to A.'s agent, with the privity of A., who thereupon ordered his agent to prepare a lease, but before it was executed, he repented and refused. B. exhibited his bill for a specific performance, but the court refused.

But, in the case of *Main v. Melbourn*, (y) Lord Loughborough considered that case as ill determined. And his lordship there made this distinction, viz. that payment of a *substantial part of the purchase money* will take an agreement, as to land, out of the statute on the ground of part-performance; but payment of a small part, whether upon the notion of binding the bargain, or on account of the purchase-money, is not sufficient.*

The case of *Main v. Melbourn* was as follows: The bill stated, that under an act of parliament for inclosing certain lands in the county of *Lincoln*, part of the premises were on the 2d of *April* 1793 allotted to the defendant in respect of a right of common to which he was entitled. The plaintiff on or about the 2d of *April* treated with the defendant for the purchase of his allotment for the sum of 105*l.*; and the plaintiff agreed to purchase the same of him at that price; and thereupon paid to the said defendant the sum of 5*l.* 5*s.* in part of the said sum of 105*l.*

The bill charged these facts; and that *William Stanger*, a neighbour of the defendant, in whose presence the money was paid, before the defendant agreed to sell the said allotment to the plaintiff, described to the defendant where it lay; and the defendant, upon receiving such information from *Stanger*, agreed to sell the said allotment to the plaintiff, and accepted the said sum of 5*l.* 5*s.* in part of the said purchase-money of 105*l.*; also, that

(x) 2 Eq. Cas. Abr. 46.

(y) 4 Ves. jun. 720.

* This point, however, is by no means settled, for in the late case of *Coles v. Trecothick*, 9 Ves. jun. 234 it was considered as doubtful; and in the case of *Clinan v. Cooke*, 1 Schoales and Lefroy's Rep. 22. Lord Redeja'e, Chancellor, is reported to have said, "That it had always been considered that the payment of money is not to be deemed a part-performance, to take a case out of the statute." But see Roberts on the Statute of Frauds, 153. and Sugden's Law of Vendors, &c 74 to 81 2 ed.

the defendant had endeavoured to prevail upon the plaintiff to receive back the said sum of 5*l.* 5*s.*

* The bill, which was filed upon the 18th of *March* 1793, prayed a specific performance of the agreement. The plea of the statute of frauds was put in in *December* 1793; and from that time no step was taken till *July* 1799; when the plea was set down to be argued.

Lord *Loughborough*, Chancellor, said, "It is not disputed, that if part of the purchase-money substantially is paid, that takes it out of the statute. But it is contended, that five guineas are not enough upon the notion of binding the bargain. I take it for granted, that five guineas were paid at the time; whether upon notion of binding the bargain or on account of the purchase-money, they are certainly part of the 100 guineas: But so small a part that it does not indicate any intention to bind the bargain. If half a crown was paid, it cannot be denied that it was part of the 100 guineas. I cannot let the plaintiff put his own construction upon the payment. I must construe the nature of it; whether it was on the account of the purchase-money or upon the notion of binding the bargain. By the plea the defendant admits the fact, as far as it is well stated by the bill. The bill states, that five guineas were paid; and avers that they were paid as part of the purchase-money. It does not strike me, that that was the nature of the transaction between the parties. The bill would have stated it the same way, if five shillings had been paid. There is something also in your not having set down this plea. You file a bill for a specific performance; and when the defendant has pleaded, you stop short upon it. What business has the defendant to go farther? It is hanging up a person upon a purchase."

But if real estates are put up to public sale, payment of the auction-duty is no circumstance of part-performance. So, where the application to enforce a contract is made by the vendor, he cannot set up the circumstance of the vendee's paying part of the purchase-money as a part-performance. He must show some act done by which he himself is prejudiced.

Thus, in the case of *Buckmaster v. Harrop*, (x) the facts were these: On the 23d of *July* 1800 certain estates were sold in four lots by distinct particulars; and two agents for *Peter Davenport Finney* were declared the best bidders, at several sums, amounting

(x) 7 Vea. jun. 341, *Coram* Sir Wm. Grant, Master of the Rolls.

to 3,119*l.*; and they immediately after the sale, declared, that they purchased for *Finney*; and *Finney* offered to pay the deposits, 10 per cent, and the auction-duty, to *Stretbill Wright*, the auctioneer, who was also the vendor: but he declined receiving either, alleging, that it was then late at night, and he had to go eight miles: but he told *Finney*, he would lay down the money; and would settle the same with him some other time, which *Finney* agreed to; and accordingly *Wright* paid the auction-duty, amounting to 77*l.* 19*s.* 6*d.* By the conditions of sale the purchaser was to have possession of lot 3. immediately, and of the other lots at *Michaelmas* next; paying the remainder of his purchase-money upon the execution of the conveyance on or before the 29th of *September*. *Finney* soon afterwards gave the amount of the auction-duty to his attornies, to be paid to *Wright*, directing them to take a proper receipt. He also sold the crops of hay, grass, and oats, then growing on the premises comprised in lot 3. for 50*l.* to a person, who afterwards took possession of the premises in that lot. *Finney* died before the 50*l.* or any rent became due. An abstract of the title was sent to the attornies of *Finney* about the 15th of *September*, who approved the title; but, before any conveyance, on 22d of *September*, *Finney* died.

The bill was filed by the heirs at law of *Finney* against the executors, the residuary legatee, and *Wright*; praying a specific performance of the contract; and that the purchase-money might be paid out of the personal estate.

The Master of the Rolls said: "The question must be the same, whether a purchase, or a sale is insisted on: Was the ancestor himself bound? Was there such an agreement as converts the real estate into *personal*, or the *personal* estate into *real*? I am of opinion, every objection may be taken upon either, which it would have been competent to the deceased to take, if he had resisted the execution in his life. The plaintiffs say, if it is necessary, and I am of opinion it is, they can show there was such an agreement. First, they say, either a sale by auction, is not within the statute of frauds; or, the auctioneer putting down the name of the vendee is an agreement in writing; and they cite *Simon v. Motivier* (a). But whatever is the authority of that case, it has been held not to extend to land. It was twice so ruled by Lord Chief Justice *Eyre*.

(a) Bul. N. P. 280. 3 Bur. 1921. *Et post.* 117.

In *Walker v. Constable*, and *Stansfield v. Johnson*, (b) it was held not sufficient that the agent wrote down the name.

The plaintiffs then contended, that the agreement is part-performed as to all the lots ; and, if not as to all, as to lot No. 3. I am of opinion this is no part-performance. The revenue laws ought never to be held to operate beyond their direct and immediate purpose, to affect the property, and vary the rights of the parties, not within the intention of the act. Upon a sale by auction so much is paid to the vendor as part-payment ; and so much to the government, as tax. If the purchaser refuses to pay the tax, his bidding is void. If he pays it, the only consequence is, his bidding has the same effect, as it would have had, if no such law had been made, and no other. That, without which there would have been no contract, cannot be said to be in part-performance of the contract. The only contract with the vendor, and which I can enforce is, for the price. But, suppose payment of the auction-duty could be considered part of the price, I do not see how that could bind the purchaser. In general, the the party seeking the performance must shew a performance on his side ; as a reason for the interference of the court in his favour ; for the ground upon which the court acts is fraud in refusing to perform after performance by the other party. The inquiry is, whether *Finney*, if so disposed, could have resisted the performance ; for, if he could, upon the principle I before stated, the heir is not entitled to call for an application of the personal estate for this purpose. Now, his refusal, after paying part of his purchase-money, would be no fraud upon the seller, but his own loss ; in this case, the loss of the personal estate. *Wright* having advanced the duty, is entitled to call upon the executors. In *Lacon v. Mertins*, the act of part-performance was payment of a considerable part of the purchase-money ; and the taking notes was only as a security, in case it should not proceed ; and it was held, that, notwithstanding that, it was part-performance ; and therefore it was a fraud to refuse performance on the other side.

Another act of part-performance was insisted upon here : the circumstance stated by the witness *Barlow* relative to lot 3. If this were held to be an act of part-performance, it could not affect any other lot ; for the several lots were included in distinct articles of sale ; and so were unconnected. But even as to this lot I am of

opinion,

(b) *Vide post.*

opinion, it is not a part-performance. The bargain with *Barlow* was the mere act of the vendor. The vendor had no prejudice. He had done nothing to entitle him to say, the non-execution was a fraud upon him. If he had let *Barlow* into possession, that would be an act by which he might have had a prejudice. All *Barlow* says is, he is now in possession; which cannot be taken to be before *Finney's* death; and nothing that passed since, could influence the question: the inquiry being, whether at his death he could have been compelled to perform the agreement. I am aware there are cases that acts done by the defendant can be made a ground for compelling him to perform the agreement: but it is difficult to bring those cases to bear; for, to what do such acts amount when there is no prejudice to the plaintiff? Only to proof of the existence of an agreement. The existence of the agreement may be put out of all doubt by the acts: but the objection upon the statute, that the agreement is not in writing, remains where it did. The court does not profess to execute a parol agreement merely, because it is satisfactorily proved. In *Whaley v. Bagenal*, which being before the House of Lords, must supersede the authority of every other case, various acts had been done, which implied that the party had sold the estate, and did not consider himself any longer the owner of it. The question still remained, whether that agreement should be carried into execution; and it was held, that the acts done by the defendant did not entitle the plaintiff to have it specifically performed.

Upon the whole the plaintiffs are not entitled to this relief."

In the case of *Whaley & Bagnel or Bagenal*, (a) the application was for a specific execution of the contract; and was made on behalf of the party by whom the acts of part-performance were not done against the party performing them. The case, in substance, was as follows: A. agreed by parol with B. for the purchase of lands. B. delivered a rent-roll, which was dated and altered in his own hand writing, and showed by the title of it, that an agreement had been made between them for the sale of the estate at twenty-one years purchase. An abstract of the title was also delivered to A. together with the deeds, in order to be compared with the rent-roll. B. likewise wrote letters to several of his creditors, informing them that he had contracted with A. for the sale of his estate, at twenty-one years purchase, and sent the tenants to treat with A. for a renewal of their leases. B., however, refused

(a) 1 Bro. P. C. 345. See also *Cooke v. Tombs*, 2 Anstr. 420. S. P.

to complete the purchase. A. thereupon filed a bill in the Court of Chancery in *Ireland*, for a specific execution of the agreement; to which B. pleaded the statute of frauds in bar; and the plea was allowed by order of the *Chancellor*; and which order, upon appeal, was affirmed by the House of Lords.

For more concerning the sale of lands *vide post.* 109.

5. *Of Agreements not to be performed within a Year, &c.*

By the last branch of the 4th clause of the statute it is enacted "That no action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Upon this part of the statute it has been holden, that if no time be stipulated for the performance of the agreement, and it is capable of being performed within a year from the making thereof, it is not within the statute, though it be not actually performed till after that period.

Thus, (b) where a *parol* promise was made to pay so much money upon the return of such a ship, which ship happened not to return within two years time after the promise made: It was made a question before all the judges whether this promise was void by the statute of frauds. They were of opinion that it was a good promise, and not within the fourth clause of the statute, for that by possibility the ship might have returned within a year; and though by accident it happened not to have returned so soon, yet as was said, that clause of the statute extends only to such promises, and by the express appointment of the party, the thing is not to be performed within a year.

So, in the case of *Peter v. Compton*, (c) which was an action upon a *parol* agreement, by which the defendant promised, in con-

(b) *Anonymous Case*, 1 Salk. 280.

(c) *Skin.* 353. *Holt.* 326. *S. C.* See also *Comb.* 463. *Skin.* 326. *S. P.*

sideration of one guinea, to give the plaintiff so many on the day of his marriage.—And the question upon the trial, before *Holt*, Ch. J., was, whether such agreement ought to be in writing, for the marriage did not happen within a year: the Chief Justice advised with all the judges, and by the great opinion (for there was a diversity of opinion, and his own was *ê contra*) where the agreement is to be performed upon a contingent, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary; otherwise not.

So, in the case of *Fenton v. Emblers*, executor of *May*, (d) where the promise was stated in the declaration thus: “that *William May*, the defendant’s testator, in consideration that the said *Sarah* (the plaintiff) would be and become the housekeeper and servant of the said *William*, and take upon herself the care and management of his family, &c., and perform, the same as long as it should please the said *William*, and *Sarah*, undertook and promised to pay wages to the said *Sarah*, at and after the rate of 6*l.* for one year; and also by his last will and testament, to give and bequeath to the said *Sarah* a legacy or annuity of 16*l.* by the year, to be paid to her yearly, &c.; and that the said *Sarah*, considering in the said promise, entered into the said testator’s service, and became his housekeeper, &c. and continued so for three years and 59 days; but that the said *William* had not performed his said agreement, and did not leave her such legacy or annuity, &c.” And it appeared upon the evidence that there was such an agreement between the said *William May*, and the plaintiff, but that it was by *parol*, and not in writing. It appeared also, that the plaintiff did enter into the testator’s service, and continued in such service till his decease; but that the testator did not give her by his last will or otherwise, the said annuity of 16*l. per annum*, or any other annuity. An objection was taken upon the fourth section of the statute of frauds, that the agreement was not to be performed within the year. And it was said, that it would be extremely inconvenient to establish promises of this kind, not reduced to writing; that the agreement could not be performed on *May*’s part within a year, for a whole year from his death was

(d) 3 Bur. 1278. 1 Bl. Rep. 353. S. C.

2d 3 May 1716 - 11 East 147.
Shin. 323

to elapse before the annuity, or any part of it, was to become payable : but it was answered on the other side, that the action was brought for *May's* not having done what he ought to have done in his lifetime, so that it *might* have been done within the year. And Mr. J. *Dennison* declared his opinion to be, in which opinion the other judges fully coincided, "that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. That a contingency was not within it ; nor any case that depended upon a contingency ; and that it did not extend to cases where the thing only might be performed within the year."

6. *Of Contracts for the Sale of Goods.*

By the 17th section of the statute of frauds it is enacted, "that no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Upon this clause of the statute it has frequently been made a question whether shares of a company, or public stock, are comprehended under the words *goods, wares, and merchandizes*. But the point does not appear to have been finally settled ; for in the case of *Pickering v. Appleby*, (e) which was an action of *assumpsit*, for 58*l.* for ten shares in the stock of the governors and company of the copper mines in *England*, transferred and sold by the plaintiff to the defendant. There was no agreement or memorandum in writing of the contract, or any earnest paid.

And upon the trial before King, Ch. J., it was doubted whether the shares in the stock of this company were within the purview and intent of the statute of frauds ; and therefore it was made a case, and argued before the court of *Common Pleas* ; and afterwards at *Serjeant's Inn* before all the judges of *England*.

(e) Com. Rep. 354.

The judges, however, being divided in opinion, the question was adjourned. (f)

But, in the case of *Musfell v. Cooke*, (g) where the plaintiff had agreed with one *Green*, the defendant's broker, for 5000*l.* *South-Sea-stock*, at 187*l. per Cent.*, to be delivered about 10 days after; and on the day appointed, the plaintiff attended at the transfer office all day, but the defendant did not come, and the stock having in the mean time considerably risen, the defendant refused to transfer it; the plea of the statute seemed to the Lord Chancellor, *Macclesfield*, to be good. It is observed (*) that this last mentioned case of *Musfell v. Cooke* came on in *Trinity* term 1720, and is probably the case alluded to in *Crull v. Dodson*, (b) wherein the court said, that it had been determined in Chancery, that bargains relating to stock are within the statute of frauds, and if earnest be not given are *nuda pacta*.

So, in the case of *Colt v. Natterville*, (i) which turned not only upon the question whether stock came within the description of goods, &c. but also upon the circumstance of something having been given as earnest.

It was a bill for a specific performance of an agreement for transferring some *York-Buildings stock*, stating that the defendant had agreed to transfer it to the plaintiff on a particular day therein mentioned, on the plaintiff's paying the money, and that the plaintiff agreed to pay so much *per cent.* and to accept the transfer, and did thereupon pay to the defendant 6*d.* earnest. To which bill the statute of frauds was pleaded, and the defendant denied that he received or accepted the 6*d.* as earnest, and alleged that no part of the stock was delivered or note given; whereupon it was argued, that the *York-Buildings*, and other stocks, were within the words and meaning of the statute of frauds, so as to require either part of the thing contracted to be sold, or to be delivered, or a note in writing, or money to be paid as earnest; for

(f) See 2 P. Wms. 308. where Lord Chancellor King said, that the judges were equally divided on this case, six against six.

(g) Prec. in Ch. 533.

* *Roberts on stat. of frauds* 185.

(b) Select Cas. in Chan. in Lord King's time, 41. Trin. 11 Geo. 3.

(i) 2 P. Wms. 307.

first, that this clause of the statute mentioned expressly contracts for the sale of any goods, or merchandizes, and that the word *goods* was of a very extensive signification. Secondly, that if one having stock should commit felony, this without question would be a forfeiture of his stock, a forfeiture to those who should have a grant of *bona felonum*, so that stock was within the words *bona*, or *goods*. Thirdly, at least it was within the word *merchandise*, for every vendible thing was merchandise; now stock was a thing vendible, and in the year 1720, was the most usual merchandise which people dealt in.

Fourthly, It could be no objection that at the time of making the statute of frauds there was no such stock as *York-Building's* stock; for suppose the said statute, instead of being made in King *Charles's* time, had been enacted in the reign of *Philip* and *Mary*, since which time hops came in, and the bargain had been made for hops to the amount of above 10*l.* in money, without writing or earnest; surely such contract had been void; besides this was most plainly within the meaning and mischief of the statute, which intended to prevent rash and precipitate bargains for above the value of 10*l.* and to restrain such bargains as were of value, to the circumstances either of paying earnest, or reducing them to writing.

Fifthly, It was insisted that Lord *Cowper* had determined such a contract for stock to be within the statute of frauds, and that if it exceeded 10*l.*, the same ought to be in writing, in regard stocks are goods and merchandizes within that statute.

On the other side it was said, that whereas the statute enacts, that no contracts should be good for the sale of goods, wares, and merchandizes, of 10*l.* price, unless part of the goods be delivered, or earnest paid, or a note in writing, this showed that such goods were intended as were capable of an actual delivery, something that was corporeal, and not stock which was incorporeal, nor was there any such thing as *York-Buildings stock* at that time.

The Lord Chancellor (*k*) said, "This question was before all the judges of *England*, who were equally divided upon it, six against six; and therefore it is a point too difficult for me to determine upon a demurrer." His lordship, however, said that stock

(*k*) *King*.

did

did not seem to be goods, wares, or merchandizes within the intent of the 17th clause. But, continued his lordship, "This plea is not well pleaded; because the bill says, that the plaintiff did pay 6*d.* as earnest, and the plea only says, that the defendant did not receive or accept it as earnest; now it is not material how or in what manner the defendant received or accepted it, but how the other paid it, for *quicquid solvitur, solvitur ad modum solventis*; and so is *Pinnel's case*, 5 Co. 117."

So, it was formerly holden, that *executory contracts* (that is where time is given for delivery of the goods) were not within this clause of the act; for that it only related to *executed contracts*, or where the goods were to be delivered immediately after the sale.

Thus, in the case of *Towers v. Sir John Osborne*, (1) where the defendant bespoke a chariot, and when it was made refused to take it; and in an action for the value, it was objected, that they should prove something given in earnest, or a note in writing, since there was no delivery of any part of the goods. But the Chief Justice ruled this not to be a case within the statute of frauds, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable, without time given him by special agreement, and the seller is to deliver the goods immediately.

So, in the case of *Clayton v. Andrews*, (m) the defendant agreed to deliver a certain quantity of wheat to the plaintiff within three weeks, or a month, from the said agreement, at a certain rate, to be paid on delivery; which wheat was understood by both parties at the time of making the agreement to be then unthrashed. No part of the wheat so sold was delivered; nor any memorandum thereof made in writing, nor any earnest given; and the question for the opinion of the court was, whether this agreement was within the statute of frauds. Lord Mansfield held upon the authority of the case in *Strange*, (n) that it was not within the statute. And Mr. J. Yates said, "The 17th clause of the statute related only to executed contracts. Here wheat was sold, to be

(1) Stra. 506. at Guildhall, *Coram Pratt*, Ch. J.

(m) 4 Bur. 2101. See also 1 H. Bl. 20. S. P.

(n) *Towers v. Osborne ut supra*.

delivered at a *future* time. It was *unthraashed* at the time when the contract was made; therefore it could not be delivered at that time. To which Mr. J. *Aston* agreed, adding that the case of *Towers v. Osborne* had always been considered an authority in point on questions of this kind.

But the distinction taken in these cases between *executory* and *executed* contracts, has been since over-ruled; and it is now settled, that where the goods contracted for are complete and ready for delivery, and existing in *solido*, at the time of the contract, it is within the statute; but that where the goods contracted for are not complete and ready for delivery, but are either to be made, or something is required to be done in order to put them into the state in which they are contracted to be sold, such a contract is out of the statute, and need not be in writing.

Thus, in the case of *Rondeau v. Wyatt*, (o) which was an action on the case for the non-performance of a special agreement. At the trial, before Lord *Loughborough*, Ch. J. it appeared, that the defendant, who was one of the proprietors of the *Albion Mill*, had entered into a verbal agreement to sell and deliver 3000 sacks of flour to the plaintiff to be put in sacks, which the plaintiff was to send to the mill, and shipped on board vessels to be provided by him in the river, on an express condition that the flour should be exported to foreign parts, from some port which the plaintiff was to open, and should not meet the defendant and the company again in the home market. In order to carry the scheme of exportation into effect, the plaintiff sent down to *Shoreham* in *Sussex* a large quantity of corn and flour merely to reduce, by collusion and a fictitious sale, the market-price to the level prescribed by act of parliament. (p) But this intended trick being discovered by government, the exportation was prevented, as the price was then very high, and an apprehension of a scarcity in this country prevailed. As the plaintiff, therefore, could not legally comply with the condition contained in the contract, the defendant refused to deliver the flour. In consequence of this, the plaintiff filed a bill in Chancery against the defendant, praying a specific performance, a discovery of facts, &c. and the names of the partners in the undertaking. In his answers to the bill the de-

(o) 2 H. Bl. 63. See also *Cooper v. Ellison*, *post*, 99. where the determination of this case was fully assented to by all the judges of the Court of King's Bench.

(p) 13 Geo. 3. c. 45. s. 5.

defendant admitted the agreement, but pleaded the statute of frauds, and averred that there was no note, or memorandum in writing, nor a delivery of any part of the flour to the plaintiff, &c. following the words of the statute. That plea being over-ruled, the present action was brought, in which the plaintiff obtained a verdict, contrary to the opinion of Lord *Loughborough*, before whom the cause was tried, who thought that on grounds of public policy, but chiefly because the contract seemed to him to be within the statute of frauds, the plaintiff was not entitled to recover. A rule was therefore obtained calling upon the plaintiff to shew cause, why the verdict should not be set aside, and a non-suit entered.

And, after the case had been fully argued at the bar, and the court had taken time to consider, Lord *Loughborough* pronounced the judgment of the court to the following effect :

“ The only point to be decided, is that which arises on the statute of frauds ; and we who are now in court, (p) think that the objection made on that statute is well grounded, and therefore that the plaintiff ought to be non-suited. It was said in the argument, 1st. That the statute does not extend to cases of executory contracts ; and 2dly. That it was not applicable, where the agreement which was the subject of the action, stood confessed by the defendant's answer to a bill in equity ; and that in the present case, the agreement did appear on the face of the proceedings in Chancery. To try the validity of the first objection it will be necessary to advert to that clause of the statute on which the question arises.” His lordship here read the clause, and afterwards observed, “ Now it is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate, for it seems plain from the words made use of, that it was meant to regulate executory, as well as other contracts.” The words are “ No contract for the sale of any goods, &c.” And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to executory contracts ; for it is from bargains to be completed at a future period, that the uncertainty and confusion will probably arise, which the statute was designed to prevent. The case of *Simon v. Mistrivier*, (q) was decided on the ground, that the auctioneer was the agent as

(p) *Viz.* Lord *Loughborough*, Mr. Justice *Gould* and Mr. Justice *Heath*. But his lordship mentioned a few days before he gave judgment, that Mr. Justice *Wilson*, who was then sitting in Chancery as one of the Lord's Commissioners of the Great Seal, had declared himself to be of a different opinion.

(q) *Bul. N. P.* 280. 3 *Bur.* 1921. *et passim* 117.

well for the defendant as the plaintiff, and therefore that the contract was sufficiently reduced into writing. The case of *Towers v. Sir John Osborne*, (r) was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labour to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable. In *Clayton v. Andrews*, (s) which was on an agreement to deliver corn at a future period, there was also some work to be performed for it was necessary that the corn should be thrashed before the delivery. This perhaps may seem to be a very nice distinction, but still the work to be performed in thrashing, made, though in a small degree, a part of the contract. Some of the cases in the Court of Chancery seem to have been founded on the nature of the proceedings in equity, where the court will lay hold of some circumstance of his own admission to compel a party to the performance of his agreement. But the same rule is not applicable to courts of law, for if a parol agreement were stated in a court of law, and there was a demurrer, which would admit the agreement, yet, still advantage might be taken of the statute. The early cases in Prec. in Chan. 208. and 374. do not seem fairly to admit any other construction than this, namely, that the court thought that, where a parol agreement was admitted by the defendant's answer, he might or might not take advantage of the statute at his option. I say, the court seem to have thought so, because in fact no such decree was made in those cases, which contain merely the extra-judicial opinions of the Lord Keeper, and the Master of the Rolls. It is said in those cases, and has been adopted in the argument, that when the defendant confesses the agreement, there is no danger of perjury, which was the only thing the statute intended to prevent. But this seems to be very bad reasoning, for the calling upon a party to answer a parol agreement certainly lays him under a great temptation to commit perjury. But though the preventing perjury was one, it was not the sole object of the statute: another object was to lay down a clear and positive rule to determine when the contract of sale should be complete. Accordingly the statute has made it necessary, that either the party buying should accept and receive part of the goods sold, or give something in earnest to bind the bargain, or that there should be some note or memorandum in writing signed by the parties to the contract. Some-

(r) *Ante*, 92.(s) *Ante*, 92.

thing therefore direct and specific is to be done, to shew that the agreement is complete, that there may be no room for doubt and hesitation. This was the intention of the statute in all contracts of sale above a certain value, in order to prevent confusion and uncertainty in the transactions of mankind; and we think it wise to adhere to that rule. It is not necessary in a court of law to inquire into the modes of proceeding by which courts of equity are guided, but it is observable, that the case of *Whaley v. Bagenal* (1) in the House of Lords, coincides with the present determination of the court.

I now proceed to show what kind of delivery and acceptance will satisfy the words of this clause when the contract is not in writing.

It is clear, that an actual *delivery* and *acceptance* either of the whole or a part of the goods sold is sufficient, where the contract is not reduced into writing. But an *actual* delivery is not in all cases necessary. The thing contracted to be sold may be *virtually* delivered, and such virtual delivery will be equally effectual to supersede the necessity of writing and signing. If, therefore, the goods sold are ponderous, and not capable of actual delivery, and the buyer accepts them, and in virtue of such transfer of the property proceeds to exert a right over them, disposing of them, or giving orders and directions respecting them, as the owner thereof, such proceedings may countervail the *actual* delivery, and vest the property in the buyer, without any written contract or earnest paid.

Thus, in the case of *Searle and others v. Kerves*, (u) which was an action of *assumpsit* for the non-performance of a contract. The declaration stated, that in consideration that the plaintiffs had bought of the defendant 20 barrels of rice at the price of 17s. per hundred weight, the defendant undertook to deliver that quantity, and assigned the breach in the non-delivery.

The evidence for the plaintiffs in support of this declaration was, that on the 26th of *September* one of the plaintiffs having been at the house of the defendant, the defendant told him that he had a quantity of rice to sell; but there was no evidence to prove any

(1) *Ante*, 86. (u) 2 Esp. Rep. 598. See also *Hinde v. Whitehouse*, on this point *post*, ante 120

contract made at that time; the plaintiffs produced an order on *Bennet* and Co. to deliver to them 20 barrels of rice, which was signed by *Kerres*; the witnesses proved that *Kerres* had told them that he had sold 20 barrels of rice, to Mr. *Searle*, at 17s. per hundred; and that he was a fool for selling it so soon, as the price of rice had advanced.

The plaintiffs then proved, the delivery of the order for the rice to the warehouseman of *Bennet* and Co.; and that the rice not being then taken away, *Kerres* on the 2d of *October* countermanded the delivery to *Searle*, the plaintiff, in consequence of which *Bennet* and Co. refused to deliver the rice to *Searle*, who sent for it on the 10th of *October* following.

The counsel for the defendant contended, that as to this count the plaintiffs ought to be nonsuited; they said that the statute of frauds in all cases of sales of goods required a note in writing specifying the terms of the contract, and being meant to guard against fraud in contracts, made it necessary to specify particularly what the terms of the sale were: in this case there was no specification of the terms, the only evidence was, the order for the delivery by the defendant, which did not specify any thing as to the price, so that it was not a sufficient note in writing under the statute.

Eyre, Ch. J. said: "The statute of frauds does not attach where there has been *earnest* or a *delivery of part of the things sold*; I think there has been in this case a delivery of the whole. *Kerres*, the defendant, gave an order for the delivery upon *Bennet* and Co. in whose possession the rice then was; this satisfies the statute, and the plaintiffs are entitled to recover."

So, in the case of *Chaplin v. Rogers*, (v) which was an action for goods sold and delivered; and the case proved, was, that the parties being together in the plaintiff's farm-yard, the defendant, after some objections and doubts upon the quality of a stack of hay (particularly the inside part) then standing in the yard, agreed to take it at 2s. 6d. per hundred weight. Soon after he sent a farmer to look at it, whose opinion was unfavourable. But about two months afterwards another farmer of the name of *Loft* agreed with the defendant for the purchase of some of this hay

(v) 1 East, 192.

Mill standing untouched in the plaintiff's yard, and the defendant told *Loft* to go there and ask what condition it was in, saying he had only agreed for it, if it were good. The plaintiff having informed *Loft* it was in a good state, he agreed to give the defendant 3*s.* 9*d.* *per cut.* for it, the defendant having told him that he had agreed to give the plaintiff 3*s.* 6*d.* for it. *Loft* thereupon brought away 36 hundred weight, but this latter fact was without the knowledge and against the direction of the defendant. There was a contrariety of evidence as to the quality of the hay when the stack was afterwards cut. At the trial, before Baron *Hotham*, it was objected that the contract of sale was fraudulent and void by the statute of frauds, being for the sale of a commodity no part of which was delivered, and of which there was no acceptance by the defendant. The learned judge, however, left it to the jury to decide whether the sale had been fraudulent, and whether under the circumstances there had been an acceptance by the defendant: and they found for the plaintiff on both points, and gave him 50*l.* damages, being the value of the hay at the price agreed for. A rule *nisi* was obtained calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had, on the grounds that the learned judge had left that as a question of fact to the jury, which he himself ought to have decided, as an objection in point of law arising on the statute of frauds; and because the evidence did not warrant the verdict.

But the court decided that there was sufficient evidence of a delivery to, and acceptance by the defendant to leave to the jury; and therefore discharged the rule.

Lord *Kenyon*, Ch. J. said: "It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it; for here the report states that the question was specifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute; that in order to take a contract for the sale of goods of this value out of it there must either be a part delivery of the thing, or a part-payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case that the jury have not done rightly in finding the fact
of

of a delivery : Where goods are ponderous, and incapable as here of being handed over from one to another, there need not be an actual delivery ; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession ; for he sold part of it to another person. Therefore as upon the whole justice has been done, the verdict ought to stand." The rule was accordingly discharged.

But a delivery of a sample, if it be considered as no part of the bulk, is not a part delivery within the meaning of the statute.

Thus, in the case of *Cooper v. Elston*, (w) which was an action of *assumpsit*, brought to recover the damages sustained by the plaintiff in consequence of the defendant's not delivering 50 quarters of wheat pursuant to his contract with the plaintiff.

At the trial, the jury found a verdict for the plaintiff, damages 50*l.*, subject to the opinion of the Court of *King's Bench* on the following case. The defendant on the 4th of *July* 1795, at *Nottingham*, sold to the plaintiff by sample 50 quarters of wheat at 4 guineas *per* quarter ; the wheat to be delivered by the defendant to the plaintiff at *Gainsborough*. Two days afterwards the defendant delivered to the plaintiff at *Nottingham* the sample by which he had sold the wheat to him : but such sample was no part of the 50 quarters to be delivered at *Gainsborough*. No money was paid by the plaintiff to the defendant on account of the wheat ; nor was there any memorandum in writing signed by the parties. The defendant afterwards refused to deliver the wheat.

The court were of opinion that this case came within the 17th section of the statute ; and therefore judgment was given for the defendant.

Lord *Kenyon*, Ch. J. said : " After this question has been agitated so long in the courts, I am glad that by the very able decision of the Court of Common Pleas, in the case of *Randean v. Wyatt*, (x) the construction of this clause of the statute of frauds is brought back to the manifest intention of the legislature in making that provi-

(w) 7 Term R.p. 14. See also *Alexander v. Comber*, 1 H. Bl. 20 S. P. (x) *Ante*, 93.

sion. To the authority of that case I entirely subscribe, and in my opinion it governs the present. The doctrine which was laid down in *Clayton v. Andrews*, (y) as to executory contracts not being within the statute, was taken from *Towers v. Osborne*. (z) I will not pretend to say that those cases were not rightly decided upon their particular circumstances. The latter was a mere contract for work and labour; the thing contracted for did not exist at the time. In the former also something was required to be done in order to put it in the state in which it was contracted to be sold. But at any rate I am at a loss to discover how this can be called an executory contract for the sale of the goods in question. The thing sold existed *in solido* at the time of the contract of sale. I am not able to distinguish this case from that of *Randean v. Wyatt*; and the grounds and principles of that decision are so amply detailed in the report of it, that it is unnecessary to add any thing more. With respect to this coming within one of the exceptions of the statute on account of the acceptance of the sample; there is no pretence for it, for the case expressly states that the sample was no part of the goods contracted to be delivered."

Grose, J. "The case of *Towers v. Osborne*, went upon the general principle that executory contracts were not within the meaning of the statute. If by that were meant contracts for the sale of goods to be executed on a future day, such a construction would be a repeal of the act: but if it only meant such contracts as were incapable of being executed at the time, then the decision was right; and such was the case then in judgment. But in this sense the contract here cannot be said to be executory, for the thing existed and was capable of being delivered. It is much to be lamented that the excellent provisions of the statute of frauds should ever have been infringed or weakened by construction: but if in this instance it has been so, I am glad that the decision in the case of *Randean v. Wyatt* has brought us back to the letter and true spirit of that law."

Lawrence, J. "The case of *Towers v. Osborne*, when truly considered, was not a contract for the purchase of goods, but for the making of some thing which had no existence at the time. The case of *Clayton and Andrews* went, indeed, somewhat farther; but still there was to be some alteration in the state of the commo-

(y) *Ante*, 92.(z) *Ibid.*

duty before it was to be delivered. The cases which have been determined in the Court of Chancery in aid of contracts of this kind were all founded upon the decisions which had been made at law, and considered as necessarily consequent upon them. But it is not difficult to collect what opinion was entertained of these decisions by Lord *Thurlow*, when the case of *Randau v. Wyatt*, came before him in the Court of Chancery: upon a bill filed to discover the facts and names of the parties in the undertaking, in order to found the action at law: he thought that the mere fact of the corn not being to be delivered immediately would not have taken the case out of the statute, if the point had been new, but he thought himself bound by the cases at law, till they were reversed by a court of law.

So, a delivery without an ultimate acceptance, and such as completely affirms the contract, is not sufficient to satisfy the words of the statute.

Thus, in the case of *Kent v. Huskinson*, (a) which was an action of *assumpsit* for goods sold and delivered, tried before Lord *Alvanley*, Ch. J. The subject of the action was a bale of sponge sent by the plaintiff, a wholesale dealer in that article, residing in *London*, to the defendant, a retail dealer residing in *Staffordshire*. Some short time before the sponge was sent by the plaintiff, he had been at the place where the defendant resided, and had received from him a verbal order under which he had acted in sending the sponge, and the price charged was 11s. per pound, amounting altogether to 75s. Soon after the sponge was sent, the defendant wrote the following letter to the plaintiff: "After receiving a letter from your house, in town, stating the bale of sponge was sent by your direction, I called on a friend or two who are competent judges of the article, and asked them to say, according to the present price of sponge, what it was worth; the answer was, not more than six shillings per pound; have therefore returned it to you by the same conveyance it was forwarded by to this place. In future will select what sponge I may want personally, otherwise will appoint some confidential friend for that purpose." The plaintiff's son being at the defendant's house soon after the sponge was returned, was told by him that he had resolved not to keep the article, because it was not so good as he had expected. It was objected for the defendant

(a) 3 Bos. & Pol. 233.

that inasmuch as this was a contract for the sale of goods of more than 10*l.* value, the case fell within the 17th section of the statute of frauds, for want of a note or memorandum in writing, and consequently the plaintiff could not recover. His lordship being of this opinion, non-suited the plaintiff.

A motion was afterwards made for a rule to shew cause why the non-suit should not be set aside. But the court were clearly of opinion, that the case was within the statute, and therefore refused the rule.

Lord *Alvanley*, Ch. J. said: "At the trial I thought, and still continue of opinion, that the evidence does not take this case out of the statute of frauds. How is any judgment to be formed as to the nature of the contract between these parties? Possibly the order was for the best, possibly for the second best sponge, or sponge of some peculiar quality; all which circumstances are left in a state of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the statute had in contemplation and meant to guard against. The only affirmation of any contract to be collected from the evidence is an affirmation of some sort of order for some sort of sponge, and it appears that the moment the article reached the defendant and was examined, he sent it back to the plaintiff, saying it was not that sort of sponge which he wanted and had ordered. The defendant's letter cannot, as it appears to me, be construed into any thing like an acceptance, so as to bring this case within the exception which has been relied on."

Heath, J. said: "According to the words of the statute, the exception does not apply, unless the vendee both receive and accept. Now that acceptance I cannot consider to be any other than the ultimate acceptance, and such as completely affirms the contract. What the nature of this order was, or under what circumstance it was given, was not proved. Possibly the sponge was sent down upon speculation only."

7. *Of the Contents and Signature, &c. of the Agreement or Memorandum required by the Statute.*

By the 4th clause of the statute it is enacted, "That no action shall be brought, &c. unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, by him lawfully authorized."

And by the 17th section it is further enacted, "That no contract for the sale of any goods, &c. for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part, &c. or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The agreement or memorandum required by the statute need not be drawn in any particular form. It may be contained in a letter, or other writing referred to by letter. But in whatever form the writing may happen to be, the agreement or promise mentioned in the fourth clause must contain with certainty, the consideration for the promise; and also a specification of the terms of the agreement or contract. It must also be signed with the name of the party to be charged therewith, or his agent lawfully authorized; otherwise the promise or contract will be void. (a)

I propose to consider these parts of the two clauses separately:
And,

1. *In what Cases the Consideration must be stated.*

The promise mentioned in the fourth section of the statute must not only be upon a good consideration, but the consideration must be set forth in the agreement or memorandum.

Thus, in the case of *Wain and another v. Warlters*, (b) the plaintiffs declared that, at the time of making the promise after mentioned, they were the indorseees and holders of a bill of exchange, dated the 14th of February 1803, drawn by one W. Gore upon and accepted by one J. Hall, whereby Gore requested Hall, seventy days after date, to

(a) Vide *Roberts on the Statute of Frauds*, 105 to 120. *Sugden on the law of Vendors*, 50, &c.

(b) 5 East, 10.

pay to his, *Gore's*, order, 56*l.* 16*s.* 6*d.*; which bill of exchange *Gore* had before then indorsed to the plaintiffs, and which sum in the bill mentioned, was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one *A.* as their attorney, to sue *Gore* and *Hall* respectively for the recovery of the said sum then due, &c. whereof the defendant, at the time of his promise, &c. had notice. And thereupon, on the 30th of *April* 1803, at, &c. in consideration of the premises and that the plaintiffs, at the instance of the defendants, would forbear to proceed for the recovery of the said 56*l.* 16*s.* 6*d.*, he, the defendant, undertook and promised the plaintiffs to pay them by half past four o'clock on that day, 56*l.* and the expences, which had then been, incurred by them on the said bill. The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto forbore to proceed for the recovery thereof; and that the expences by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the said *A.*, and on account of his having, before the defendant's said promise, drawn and engrossed certain writs called special *capias*, against *Gore* and *Hall* respectively on the said bill, amounted to 20*l.* of which the defendant had notice; yet the defendant did not at half past four o'clock on that day, &c. nor at any time before or since, pay the said sum of 56*l.* and the said expences incurred, &c. There was another special count, charging that the reasonable expences incurred on the bill were so much, which the defendant had refused to pay. And the common money counts.

In support of the undertaking laid in the declaration the plaintiffs, at the trial, at *Guildhall*, produced the written engagement signed by the defendant, which was in these words: "Messrs. *Wain* and Co. I will engage to pay you by half past four this day, fifty-six pounds and expences on bill that amount on *Hall*, (signed) *Jno. Warlters*, (and dated) No. 2. *Coruill*, *April* 30th, "1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, were in writing, as required by the statute of frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence, (which

(which the plaintiffs proposed to call in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum it stood simply as an engagement to pay the debt of another without any consideration, and was therefore *nudum pactum*, and void.

Lord *Ellenborough* Ch. J., before whom the cause was tried, being of this opinion, nonsuited the plaintiff. And upon a motion for a rule to set aside this nonsuit, the court determined that the consideration ought to have been stated in the agreement; and therefore discharged the rule.

Lord *Ellenborough* Ch. J., after noticing the definition of the word *agreement* by Lord C. B. *Comyns*, who considered it as a thing to which there must be the assent of two or more minds, and which, he says, ought to be so certain and complete, that each party may have an action upon it, for which, in addition to the author's own authority, was cited that of *Plowden*; and better, (his lordship observed) could not be cited.

"In all cases where by long habitual construction the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the statute of frauds has the word *agreement* ("unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing," &c.) And the question is, whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise* or undertaking, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect; the more so when it is considered by whom that statute is said to have been drawn, by Lord *Hale*, one of the greatest judges who ever sat in *Westminster Hall*, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special *promise*; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never
meant

meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause, but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And, indeed, it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration, as well as the promise, would be rendered certain. The authorities referred to by *Comyns* all show that the word *agreement* is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shown; and the promise is not binding by the statute unless the consideration, which forms part of the agreement, be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word *agreement* in the statute, which appears to be most apt and proper to express that which the policy of the law seems to require, and finding no case in which the proper meaning of it has been relaxed, the best construction which we can make of the clause is to give its proper and legal meaning to every word of it."

Grose J. "It is said that the parol evidence tendered does not contradict the agreement; but the question is, whether the statute does not require that the consideration for the promise should be in writing as well as the promise itself? Now the words of the statute are, "that no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, &c. of another person, &c. unless the *agreement* upon which such action

action shall be brought, or some memorandum or note thereof, shall be in writing," &c. What is required to be in writing, therefore, is the *agreement* (not the promise, as mentioned in the first part of the clause,) or some *note or memorandum of the agreement*. Now the *agreement* is that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be in *writing*. If it were only necessary to show what *one* of them was to do, it would be sufficient to state the *promise* made by the defendant who was to be charged upon it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent. For without the parol evidence the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the *agreement*, by which must be understood the whole agreement, should be in writing."

Lawrence J. "From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration I agree with my lord and my brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the *promise* should have been stated in writing; but it goes on to direct that no person shall be charged on such *promise* unless the *agreement*, or some *note or memorandum thereof*, that is, of the *agreement*, be in writing; which shews that the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing."

Le Blanc J. "If there be a distinction between *agreement* and *promise*, I think that we must take it that *agreement* includes the consideration for the promise as well as the *promise* itself: and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however,

ever, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, "unless the *promise* or *agreement* upon which the action is brought, or some note, or memorandum thereof, shall be in writing." But not having so done, I think we must adhere to the strict interpretation of the word *agreement*, which means the consideration for which, as well as the *promise* by which the party binds himself."

But the same rule of construction does not apply to the 17th section of the act, *viz.* upon a contract for the sale of goods.

Thus, in the case of *Egerton v. Matthews* and another, (c) which was an action on the case against the defendants for not accepting and paying for certain goods, which they had contracted to purchase by the following memorandum in writing: "We agree to give Mr. *Egerton* 19d. *per* pound for 30 bales of *Smyrna* cotton, customary allowance, cash 3 *per cent.* as soon as our certificate is complete. (Signed) *Matthews* and *Turnbull*, and dated 2d of *Sept.* 1803." The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance, and after it was allowed they signed the memorandum again. On the opening of this case at the trial, before Lord *Ellenborough* Ch. J., it was objected on the authority of *Wain v. Warlters*, that the contract being altogether executory, and no consideration appearing on the face of the writing for the promise, nor any mutuality in the engagement, it was void by the statute of frauds. And it not being at the time adverted to that the case cited turned upon the meaning of the word *agreement* (*i.e.* to pay the debt of another) in the 4th clause of the statute, and that this case was governed altogether by the 17th clause, the object and wording of which is different, and which has not the word *agreement*, the plaintiff was nonsuited. But on a motion for setting aside the nonsuit, when the attention of the court was called to the difference of the two clauses, Lord *Ellenborough*, on granting a rule *nisi*, expressed his assent to the distinction between the two cases, and said, that the nonsuit had proceeded upon a mistake at the trial in supposing that they were the same. And, at a subsequent day, on showing cause against the rule, the court determined that the case did not come within the statute, though the contract was not signed by the feller. And Lord *Ellenborough*

(c) 6 East, 307. See also *Champion v. Plummer*, post, 118.

Ch. J. observed, "that the words of the statute were satisfied if there were "some note or memorandum in writing of the bargain, signed by the parties to be charged by such contract." And this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute requires."

Lawrence J. "The case of *Wain v. Warlters* proceeded on this, that in order to charge one man with the debt of another, the agreement must be in writing; which word agreement we considered as properly including the consideration moving to as well as the promise by the party to be so charged; and that the statute meant to require that the whole agreement, including both, should be in writing."

2. *Of the Contents and Signature, &c, required in a Contract or Sale of Lands, &c.*

In the case of *Seagood v. Meale and Leonard*, (d) a bill was brought for a specific execution of an agreement for the purchase of nine houses, which were in mortgage to the defendant *Leonard* for 150*l.* The defendant *Meale*, the owner of the houses, agreed to sell them to the plaintiff for such a sum of money, and the plaintiff paid him a guinea in part, and sent a note to this effect: "Mr. *Leonard*, pray deliver my writings to the bearer, I having agreed to dispose of them. Am your humble servant." The defendant *Leonard* would not part with them, unless all his money were paid him down, and afterwards bought the houses of *Meale* himself thereupon the plaintiff brought this bill.

The defendant by his answer insisted upon the statute of frauds and perjuries; and the question was, whether the letter or note would bring it out of the statute? for as to the payment of the guinea, that was agreed clearly of no consequence, in case of an agreement touching lands or houses; the payment of money being only binding in cases of contracts for goods.

And it was decreed that it would not, for it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for this mentioned not the

(d) Prec. Chanc. 560. Stra. 426. S. C. See *Syden on the law of Vendors*, 77.

sum

sum that was to be paid, nor the number of houses that were to be disposed of, whether all or some, or how many, nor to whom they were to be disposed of, neither did this letter mention whether they were to be disposed of by way of sale or assignment of lease, and so all the danger of perjury, which the statute was to provide against, would be let in to ascertain this agreement.

So, in the case of *Clerk v. Wright*, (e) the plaintiff had agreed for the purchase of an estate of the defendant, but the agreement was not reduced into writing; however, in confidence of the agreement, plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate: some time after the defendant sent a letter to the plaintiff, informing him, that at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that the plaintiff should not have the estate, unless he would give him a larger price.

The bill was brought to carry the agreement into execution, to which the statute of frauds was pleaded.

Lord Chancellor (f) allowed the plea, and observed, the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein mentioned. As to the objection that this agreement was in part-performed, he allowed that when a man takes possession in pursuance of an agreement, or does any act of the like nature, the court will decree an execution of it, but the circumstances only of giving directions for conveyances and going to take a view of the estate he thought not sufficient.

Lord Chancellor Cowper, (g) in speaking of the fourth clause of the statute of frauds said, that that clause had not only directed such agreements to be in writing, as if that alone were sufficient, but went further, and directed them to be signed by the parties themselves, or some other lawfully authorized by them for that purpose; that to obviate the pretence of such and such cases being out of the mischief of the statute, the parliament had in general words comprehended all, and directed that all agreements should be in writing, and signed by the party; that he knew no case

(e) 1 Atk. 18. bis.

(f) *Hardwicke*.

(g) See the Case of *Bawdes v. Amburst*, Prec. Chan. 403.

where an agreement, though it were all written with the party's own hand, had been held sufficient, unless it had been likewise signed by the party, and said, that the party's not signing it was in evidence that he did not think it compleat; that he had left it to an after consideration, and might afterwards make alterations or additions in it; and therefore, unless it were either signed by him, or something equivalent done, to show that he looked upon it as compleated and perfected, he thought such writing by the party himself was not sufficient to bind him within that statute.

But in the case of *Welford v. Beazely*, (b) a question arose upon the statute of frauds and perjuries, whether a person subscribing a deed as a witness only, which she knew the contents of, could be said to have signed it within the meaning of that statute.

Lord Chancellor *Hardwicke* said, "The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other, and therefore, both in this court and the courts of Common Law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon.

The word *party* in the statute is not to be construed party as to a deed, but person in general, or else what would become of those decrees where signing of letters, by which the party never intended to bind himself, has been held to be a signing within the statute.

There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provision of it."

Lord *Hardwicke* denied the general doctrine as laid down in *Bowdes v. Amburst*, though true as applied to that case by Lord *Cropper*, and said the difference betwixt the two cases was, that the writing there, though all in the father's hand, was only a sketch of an agreement not settled or confirmed by the parties;

(b) 3 Atk. 503. 1 Vcz. 6. 1 Wils. 118 S. C. But see *Hawkins v. Holmes*, 1 P. Wms. 770, *Stokes v. Moore*, 1 R. Wms. 771. n. 1.

but

but here the defendant signed it as a complete agreement, and, as she knew the contents, is to be bound by it in the present case.

And this opinion of Lord *Hardwicke* was recognized and acted upon in the case of *Tawney v. Crowther* and another, (i) which was as follows: the defendant *Crowther*, being seised of a house called the *White Hart* inn, in *Benson* in the county of *Oxford*, which he was desirous of selling the plaintiff employed the other defendant, *Morrell*, an attorney at *Oxford*, to treat for the purchase; who agreed to give, and *Crowther* to take, 1100*l*, and it was agreed between them, that the agreement should be reduced into writing, in order to be signed: it was accordingly reduced into writing; but *Crowther*, wishing to receive the rent due at *Michaelmas*, possession was not to be delivered till then; but the defendant declared that his word was as good as his bond, and that he should be in *Oxford* on the *Tuesday* morning, and would then call on the defendant *Morrell*, and sign the agreement. Defendant *Crowther* not coming on *Tuesday* morning to *Oxford*, defendant *Morrell* wrote a letter to him, saying, that, "though he had no doubt *Crowther's* word, as he had declared, was as good as his bond; yet as life was uncertain, he wished the agreement to be signed." In answer to this, defendant *Crowther* wrote a letter, in which he stated his having been from home, and acknowledged he said his word should be as good as his bond, and that there was time enough from thence to *Michaelmas*, to settle every thing; and again repeated once more, that his word should always be as good as any security, he could give. This letter was afterwards stamped.

The defendant *Crowther*, afterwards, refusing to complete the agreement, the plaintiff filed his bill for a specific performance; to which the defendant pleaded the statute of frauds. This plea, however, was over-ruled, the Lord Chancellor *Thurlow* being of opinion that the letter was sufficient to prevent the operation of the statute.

But when the cause came on to a hearing, the statute was again insisted on by the answer. Upon which the Chancellor pronounced the following judgment.

"The question turns on two points, 1st, As it stands under the statute of frauds; 2dly, independently of the statute. And 1st, as to the statute of frauds, it is an easy question taken by itself.

(i) 3 Bro. Chan. Rep. 161. 318.

A good deal of ingenious argument has been made use of to prove that the letter is insufficient to take it out of the statute of frauds. If the letter contains the terms of the agreement, or if it refers to another paper which contains the terms, that is sufficient; for I am of opinion, that if a letter refers so clearly to an agreement, as to show what was meant by the parties, where the existence of the paper is proved by parol, that will take the case out of the statute. Then how is the fact? *Crouther* writes a letter referring to a paper in his own possession, and promises to perform; such a letter would be sufficient to draw them from the objection, that the promise is not in writing. Then independent of the statute: if a letter, now, will bind the party; before the statute, a parol agreement would have been binding. The question is, whether here is sufficient to raise a contract that will bind. If the letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the statute; but, I confess, on what appears here, the papers do refer to that agreement, to contain a promise to perform it; the defendant did intend by the letter to raise a confidence that the agreement should be performed. If he had meant only to treat further, it would not have taken it out of the statute, being only *ad referendum*; but no doubt he meant to refer to the agreement which had been reduced into writing, and which he had carried away with him. The question is, whether the writing referred to in *Morrel's* letter was that which he wished to be signed; I think it was; then *Crouther* said, he would call on him. He admits, that on the day he thought he should be there, he would call; he does not deny it was for the purpose of signing the agreement. This, if it refers to the agreement, is sufficient; and I think it does. There is evidence in the cause of the parol agreement, which refers it to the head of cases where evidence is admitted of what passed by parol. It is argued, that he took time till *Michaelmas*, not to complete the former, but to make a further agreement; it is true the conveyance was to be at *Michaelmas*; then what are his words? "My words shall be as good as any security I could give." The signing the paper was the security pointed to. On the whole matter, therefore, he has agreed, by writing, to sign it. Several cases have been cited, and it has been argued, that he declined to sign it. If he had said, he never would sign it, &c. he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to

perform it; if he said he would never sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted; but here I am of opinion that the agreement must be performed."

So, in the case of *Coles v. Trecothick*, (k) Lord Chancellor Eldon decided that the signature of a clerk to an agent for the seller, to an agreement, though in the character of a witness, was a sufficient signing, the clerk being considered duly authorized to sign for the

particular of sale in writing is not sufficient to take the case out of the statute, unless the party purchased by it, or it was shown to be so at the time of purchase.

Thus, in *Cass v. Waterhouse*, (l) the case was, *Waterhouse*, the defendant, was possessed of several houses as executrix to her husband, for several terms of years, and which were in mortgage at the time of his death; and there were likewise two other houses which the husband had purchased for years, in his own and his wife's names, which were not in mortgage at his death; after the death of the husband, the defendant, his executrix, gave out particulars, wherein were contained, as well the houses not in mortgage, as those that were in mortgage, in order to sell them, and were shown the plaintiff *Cass*, who had been much intrusted and advised with in all concerns of the family.

Other purchasers not bidding enough, *Cass* himself, who was a creditor of the husband, came to an agreement with the defendant, for the purchase of all the houses, and it was pretty evident in the case, that all the houses were taken by the plaintiff and defendant to have been in mortgage; and that the defendant was not apprized that she had any title to any of them in her own right, and upon the plaintiff's agreement there was a conveyance executed of the houses, but by the words of it, it was restrained to such as were in mortgage.

Afterwards, the defendant being advised that the houses which were purchased in her husband's name and hers, came to her by survivorship, and were not liable to his debts; and not being in mortgage, they were not conveyed to the plaintiff; she refused to

(k) 9 Ves. jun. 234.

(l) Prec. Chan. 29.

let him have them, though it appeared in the cause, she had often said she had sold them, as well as the rest, to the plaintiff, and he had paid the taxes for them; so this bill was brought to have the houses conveyed, and to have a further assurance of the others according to a covenant.

But the bill was dismissed, as to all but the making farther assurance; for though the court seemed satisfied that the defendant had covenanted to convey all to the plaintiff, and thought she had so done, yet there being no agreement in writing, as to the two houses not comprised in the conveyance, the statute of frauds and perjuries stood so full in their way, that they could not decree the conveying of them; for though the particular were in writing, and these two houses mentioned in it, as well as the others; and though it was proved, that that particular was showed to the plaintiff, yet it was not proved to have been shown to him on his purchase, nor that he purchased by it.

So, a writing in order to be binding within this statute, should always import the assent and privity of both the parties in respect to the treaty or transaction itself. A mere entry therefore in a steward's book of contracts with the tenants, was not allowed to be evidence itself of an agreement for a lease between a lord and a tenant. (m)

So, a contract is entire; and therefore if any part is void by the statute the whole must fail.

Thus, in the case of *Cooke v. Tombs*, (n) which was a bill for a specific performance of an agreement for the sale of certain freehold premises and stock in trade, principally consisting of stock and timber for ship building, and some houses; the defendant pleaded the statute of frauds. It appeared, that pending the negotiation, the defendant delivered to the plaintiff a particular of the premises and property to be sold, and the terms or conditions of the sale, all in his own hand writing, and signed by him when it was agreed, that the plaintiff should have till a certain day to consider of the purchase, as he objected to the price. It was afterwards agreed, that the purchase should take place at a reduced price; and verbal instructions for a conveyance were given by both

(m) *Charlewood v. the Duke of Bedford*, 1 Atk. 497.

(n) Anstr. 420. See also *Lea v. Barber*, Ibid. 425. n. *Chater v. Beckett*, 7 Term Rep. 201. *et ante*, 70. S. P.

parties together to an attorney, to whom the defendant delivered the particular as instructions for the deed, which was prepared, read over, and approved of by the parties. The Court of *Exchequer* held, that these circumstances were not sufficient to take the agreement out of the statute: that the particular was not made out as evidence of any agreement, but merely as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value; that it was delivered into the attorney's hands for the same purpose; and was signed merely to authenticate it as such list: that it was delivered in as the foundation of a sale at a higher price; and could be of no evidence of the terms of the second contract, or even of its existence; since with the price, the parcels also may have been varied: that the instructing an attorney to draw conveyances, and his doing so, is no part-performance of a contract: to take the case out of the statute, there must be a part-execution of the substance of the agreement itself: that the agreement being void as to the land, must be void also as to the personal property, which was to be sold with it; *it is one entire contract, and the whole must stand or fall together*: that it could never be the intention of the parties, that the stock should be sold apart from the premises, as most of it was of little comparative value separately; and the agreement being for one entire sum, they could not sever it.

3. *Of the Contents and Signature, &c. of a Contract for the Sale of Goods.*

Where an order had been given for a quantity of goods, and a bill of parcels with the *vendor's name printed thereon* delivered at the same time to the buyer, a subsequent letter written and signed by the vendor, referring to the order, was connected with the bill of parcels, so as to raise a sufficient contract in writing within the 17th clause of the statute.

Thus, in the case of *Saunderson v. Jackson* and another, (o) which was an action on the case against the defendant for not delivering 1000 gallons of gin to the plaintiff within a certain time, according to a bargain entered into between them. There was a second count for not delivering within a reasonable time.

(o) 2 Bos. and Pul. 238. 3 Esp. Rep. 180. S. C. See also *Fowle v. Freeman*, 9 Ves. jun. 351. *Coles v. Trecothick*, *ibid.* 251.

The cause was tried before Lord *Eldon*, Ch. J. The contract for the delivery of the gin having been proved on the part of the plaintiff, the defendants insisted that the case was within the statute of frauds, inasmuch as there was no note or memorandum in writing of the bargain. The circumstances were as follow : At the time the order for the gin was given by the plaintiff to the defendants, a bill of parcels was delivered to the former, the printed part of which was, "*London. Bought of Jackson and Hankin, distillers, No. 8, Oxford-Street,*" and then followed in writing, "1000 gallons of gin, 1. in 5. gin 7s. 3s. 5d." About a month after the above period the defendants also wrote the following letter to the plaintiff: "Sir we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder ; must request you to return our pipes. We are, your humble servants, *Jackson and Hankin.*"

On this evidence his lordship directed the jury to find a verdict for the plaintiff, reserving the point made for the consideration of the court.

When the case came on for argument, the court were of opinion, that it was not a case within the statute. And Lord *Eldon*, Ch. J. said : "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute. The single question therefore is, whether if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as his written name ? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds. For although it be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient, yet as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff signed by the defendants. It has been decided that if a man draw up an agreement in his own hand writing, beginning "I A.B. agree, &c.," and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed.

signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract.

But, a note or memorandum not containing the name of the buyer, and signed by the feller only, is not a sufficient signing; within the statute.

Thus, in the case of *Champion* and another v. *Plummer*, (p) which was an action against the defendant for not delivering to the plaintiffs 20 puncheons of treacle bought of him by the plaintiffs at 37s. per hundred, to be delivered on the 10th. of December, 20 puncheons at 36s. 6d. per cwt. to be delivered on the 31st of October; and 10 puncheons at 37s. per cwt. to be delivered on the 1st of November,

At the trial before Sir *James Mansfield*, Ch. J. it was proved, that a bargain for the treacle in question was made between the plaintiff's clerk and the defendant, as stated in the declaration, and that the following note was made by the plaintiff's clerk in a common memorandum book, and signed by the defendant as under:

Left leaf of the book,	Right leaf of the book.
" Bought of <i>W. Plummer</i>	
20 Puncheons of treacle	10 Puncheons @. 37 ⁰
37 ⁰	
to be delivered by 10 Dec.	
(Signed) <i>Wm. Plummer.</i>	
20 Puncheons treacle 36 ⁶	
say 37 ⁰	
1 Nov.	
31 Oct. <i>Wm. Plummer.</i> "	

On the part of the defendant it was objected, that this did not amount to a sufficient note or memorandum of the contract within the statute of frauds, as it was not signed by the purchaser; and his lordship being of this opinion, nonsuited the plaintiff.

A rule nisi was afterwards obtained calling on the defendant to show cause why the nonsuit should not be set aside and a new trial had.

The counsel for the defendant showed cause, and insisted that it did not appear by the memorandum who was the buyer of the goods, and, as it was not signed by the buyer, he could not be bound by it, consequently the defendant ought not to be bound by an agreement which would not bind the other contracting party. With respect to the case of *Saunderson v. Jackson*, (q) which was referred to on moving for the rule, he observed, that upon reference to the brief in that cause, it appeared that the name of the purchaser was stated in the bill of parcels, though that circumstance is not mentioned in the report, the case having turned entirely upon the sufficiency of the vendor's signature.

Sir James Mansfield, Ch. J. said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note, it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs; there cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser as well as of the seller, in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain."

The other judges being of the same opinion the rule was discharged.

4. *Of Sales by Auction, and by Brokers; and of the Distinction between a Contract for the Sale of Lands and of Goods.*

Upon a sale of goods at a public auction, the auctioneer, after knocking down the hammer, is considered as agent for the buyer, and his setting down the name of the buyer, and the price, &c. in writing, is sufficient to satisfy the 17th clause of the statute. (r)

Thus, in the case of *Simon v. Motivos*, (s) the defendant bought a lot for more than 10l. at an auction, catalogues and conditions of the sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name and the price against

(q) *Ante* 116. (r) Note also, the agent's authority need not be in writing. Vide *Waller v. Hendon and Cox*, 5 Vin. Abr. 524. fo. ed. See also 9 Ves. jun. 251.

(s) 3 Bur. 1921. 1 Bl. Rep. 599. S. C. But this case is said to be more accurately reported in *Bul. N. P.* 280. by the name of *Simon v. Metivier*. I have therefore taken the report of it from that book.

the lot in the printed catalogue by the order and assent of the defendant. Between the day of the sale, and the time for taking the lot away, the defendant sent his servant to see them weighed; which he did. The defendant neglecting to take away the goods, they were re-sold at a considerable loss; and this action was brought for the difference, and the court strongly inclined that sales by auction were not within the statute of frauds, because multitudes are generally present who can testify the terms of the contract. 2dly, They held the contract was here sufficiently reduced into writing, and signed by an agent of the defendant's; for the auctioneer for that purpose was his agent. 3dly, They held the weighing by his servant was a delivery. 4thly, *Yates, J.* held that as the contract was executory, viz. the lot to be fetched away in six weeks, that therefore it was not within the statute.

So, in the case of *Hinde v. Whitehouse and Galan*, (t) which was an action of *assumpsit* to recover the price of certain sugars sold by auction to the defendants; and the point in dispute was, whether the plaintiff or defendants should bear the loss of the sugars in question, which were knocked down to the defendants, by the auctioneer, at a sale on the 20th of *September*, and which were burned on the 22d of *September* by an accidental fire in one of the king's warehouses at *Liverpool*, where they were deposited. At the trial, it was proved that the sugars, after being landed at *Liverpool* on the plaintiff's account, were deposited in one of the king's warehouses there, under the locks of the king and of the plaintiff, from whence they could not be removed until the duties were paid. Previous to the sale, samples were taken of the sugars, about half-a-pound weight out of each hoghead, according to custom. The printed catalogues of goods for sale were made out in this form, and distributed: "To be sold by auction, at *Waterhouse and Sill's* office, on *Friday* the 20th of *September*, 1805 at 1 o'clock, 300 hhds. *Jamaica* sugar, just landed. For particulars apply to *Thomas Hinde*, merchant, or *Waterhouse and Sill* brokers.

Lot	Mark	Hhds.	Gross Wt.		
1.	L. A.	10	119	3	9
2.		10	121	0	7
&c.					
23.	R. H.	12	169	3	13
&c.					
27.		15	207	2	13
&c.					

(t) 7 East, 558.

At the time of the sale the auctioneer's printed catalogue lay on the desk before him, and he wrote down in the same line with the lot purchased the name of the highest bidder, or purchaser, and the price bid *per cwt.* thus :

Lot	Mark	Hhds.	Gross Wt.				
23.	R. H.	12	169	3	13	74.	{ <i>Whitehouse</i> and <i>Galan.</i>
27.		15	207	2	13	74.	{ <i>Whitehouse</i> and <i>Galan.</i>

The auction was holden at the time and place appointed, and was conducted by Mr. *Sill*, as auctioneer. There was no other sale on the same day. The samples were exhibited in the sale-room, and the lots in question were knocked down to the defendants as the highest bidders. At the commencement of the sale the auctioneer, having the catalogue, and also a written paper containing the conditions of sale, in his left-hand at the same time, read the latter paper, as the conditions on which the sale of the sugars mentioned in the catalogue was to proceed, to the company assembled, (including one of the defendants) which paper was entitled "Conditions of Sugar Sale, *September 20th 1805*;" and which paper he afterwards deposited on his desk under the catalogue, on which catalogue he wrote his minutes of the bidders' names and prices; but the two papers were not fastened together in any manner. He also made the following declaration by parol to the bidders, which, after the sale, his clerk wrote down upon the paper of conditions of sale. "N. B. These sugars, gentlemen, have been drawn in the warehouse within the last two days; as such, no allowance whatever will be made, except where an evident error is manifest. *The duties are not yet paid, but we intend paying them to-morrow morning.*" It is customary at such sales to give an option to the purchaser to take the sugars sold according to the weights taken at the king's beam, which were marked in the catalogue, or to have them re-weighed: to this option one of the conditions of sale points. But it is the constant practice for the purchaser to declare his option before he leaves the sale-room, if he wish to have them re-weighed, in order that the seller may know how to make out the invoices; otherwise, if he then declare no option, the invoices are made out according to the weight at the king's beam. In the present case the defendants declared no option. The sugars are always weighed on landing, before they are put into the warehouse; on which weighing the duties are ascertained; and after that

that the samples are drawn. The samples are always delivered to the purchaser as a part of his purchase to make up the quantity; and were accordingly delivered to the defendants on the same day after the sale. The invoices were made out on *Saturday* the 21st of *September*, but were not delivered to the defendants till *Monday* the 23d, after the fire happened. The duties are always included in the price of the sugars, and such duties are always paid by the vendor, and are so required to be by the stat. 41. Geo. III. c. 44. and till paid the sugars cannot be removed from the king's warehouse. The sale was over by a quarter past 4 o'clock on *Friday* the 20th, but from the hours of office, and the distance, there was not time after the sale to get the entries made, and to pay the duties. *Saturday* and *Sunday* were holidays at the custom-house; and *Monday* the 23d was kept as such, being the king's coronation day. The circumstance of *Saturday* being a holiday was not recollected at the time of the sale, when the auctioneer declared that the duties should be paid on the morrow; but the circumstance was mentioned by the defendant *Whitehouse*, to a clerk of *Waterhouse* and *Sill*. On this point the jury found that there was no neglect in the vendor as to the non-payment of the duties before the fire happened, which was in the course of *Sunday* the 22d. The auctioneer said that it often happened that purchasers sold their sugars again before the duties were paid, and before they were delivered out of the warehouse; and that after the fire the defendants gave him instructions to take care of the goods, and save what he could, *without prejudice* to the rights of the parties.

Upon this proof it was objected that there was no legal evidence sufficient to fix the defendants with the purchase of these goods within the statute of frauds; there being no memorandum in writing of the contract signed by the parties or their authorized agent. That the auctioneer was no authorized agent of the vendees; but that supposing he were so, the whole contract must appear upon the paper signed by him with the names of the defendants, whereas the conditions of sale, which formed an essential part of the contract, were not so signed, nor in any ways connected, except by parol testimony, which was inoperative by the statute, with the catalogues signed. And that the delivery of the samples was *diverso intuitu*, and not as part of the goods contracted for. The learned judge (u) over-ruled the objection, but reserved the

(u) *Rooke*.

point

point for the opinion of the *Court of King's Bench*; and a verdict was found for 1110l.

After this case had been fully argued at the bar, and the court had taken time to consider, Lord *Ellenborough*, Ch. J. delivered the opinion of the court as follows :

“ This was the case of a sale by auction of sugars in the king's warehouse and which were afterwards burnt whilst they remained there under the king's lock, and deposited there for the receiving of the king's duties. And the question is, whether such a sale of those goods has taken place, as is sufficient to change *the property*, and to make them the goods of the purchasers ? The goods were put up to sale on the 20th of *September*, in pursuance of a catalogue of sale which had been previously distributed for that purpose, containing the lots, marks, number of hogheads, and gross weights of the sugars, and referring for further particulars to the brokers ; and they were sold on that day, according to certain conditions of sale, which the auctioneer read to the bidders assembled, as the conditions on which the sale of the sugars enumerated in the catalogue was to be made ; and the auctioneer also informed them that the duties were not then paid, but would be paid by the sellers on the morrow. It is admitted however that no laches is imputable to the sellers for the non-payment of the duties between the time of sale and the fire, which happened on the 22d of *September*. Two questions have been made on the 17 section of the statute of frauds, upon which question it depends whether what has passed between the parties as to those goods constituted a valid contract of sale in respect to them. The first question argued upon the latter words of that section is this ; Is the writing which has been put upon the catalogue of sale by the auctioneer “ *a note or memorandum in writing of the bargain made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized,*” within the meaning of the statute ? The second question is, whether this be a case in which the buyer can be said to have “ *accepted part of the goods sold, and actually received the same ?*” But independently of and besides these questions, it has been said that sales by auction are not within the statute ; and the case of *Simon v. Motives*, reported in 3 Burr. 1921. and 1 Blac. Rep. 599. has been relied on. The report in Burrow does not distinctly mention this latter point. But in the report of Sir W. *Blackstone*, Lord *Mansfield*, speaking of sales by auction, says, “ The solemnity of that kind of sale precludes all perjury as to the fact itself of sale.” He then mentions the case of a sale of sugars by auction, which

which were "afterwards consumed by fire in the auction warehouse, and where the loss fell upon the buyer." He afterwards adds, "According to the inclination of my present opinion, auctions in general are not within the statute." And Mr. Justice *Wilmot* says, that he "inclined to think that sales by auction, openly transacted before 500 people, are not within the statute." With all deference to these opinions I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing in a statute applying to all sales of goods above the value of 10*l.*, without exception, merely because the quantum of parol evidence in the case of an auction is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in market overt: and if we once get loose from the positive words of the statute, it will become a question only of the quantum and degree of danger of perjury in each particular instance: which opens a door to an indefiniteness of construction founded on all the varying circumstances of the time and frequency of persons attending the places of sale, and the like; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world who are to be governed by it. I am not therefore prepared to say that sales by auction are not meant to be comprehended within the statute. Nor would I be understood as giving any conclusive opinion to the contrary: neither is it necessary that I should upon the present occasion. The first question on the letter of the statute is, Is this a memorandum of the bargain made *by an agent of both parties*? In respect to sales of goods, it has been uniformly so holden ever since the case of *Simon v. Motivos*; and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling, and where the memorandum in the broker's book, and the *bought and sold notes* transcribed therefrom, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each. All the great transactions of sale in this great city are so conducted, and stand on this foundation of legality only: and it is too late, I conceive, to draw it into question. Supposing the auctioneer or broker for sale to be the agent of both parties, the question then is, has he made a memorandum of the bargain in this case? and it appears to me that he has not. The minute made on the catalogue of sale, which is *not annexed* to the conditions of sale, nor has any *internal reference thereto*, by context or the like, is a mere memorandum of the name of

of a person, whom perhaps we may intend to be the purchaser, and of the quantity and price of the goods, which we may perhaps, on the foot of such memorandum also intend to have been sold to the person so named in the catalogue. But in treating it as such memorandum throughout, we must intend also, (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale. And the conditions of sale, though as unsigned they cannot be evidence of the bargain itself, are yet capable of being given in evidence; and accordingly have been so, as a part of the transaction between the parties, and in order to show that it was on those conditions that the goods were sold. I am of opinion therefore that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale.

As to the next question on the statute; inasmuch as the half pound sample of sugar out of each hoghead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer; and to be allowed for specifically, if he should chuse to have the commodity re-weighed; I cannot but consider it as a part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer. And although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also in pursuance of the purposes of the parties, as expressed in the conditions of sale, namely, as a part-delivery of the thing itself, as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly.

As to the last point made in argument, viz. that there has been no effectual sale in this case made, because the commodity was incapable of delivery till the king's duties were paid; and which were to be paid by the seller; I think that the sale, within the meaning of the parties to the conditions, was complete, so as to cast the subsequent risk of loss upon the buyer. The words, "time of sale," and "highest bidder to be the purchaser," all evidently relate to the transaction of selling at the time and place of auction; which was considered between them as effectual for the purpose of transferring the property and the consequent risk of loss from the buyer to the seller, notwithstanding the intermediate

diate right of custody or lien upon the goods in the crown until the duty should be paid. Besides, after earnest given, the vendor cannot sell the goods to another without a default in the vendee: and therefore if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person. Per Holt. Ch. J. in *Langford v. Administratrix of Tiler*, Salk. 113. So in Noy's Maxims, 88. it is said, "If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered; yet the *property* of the horse is *by the bargain* in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And *if the horse die in my stable between the bargain and the delivery*, I may have an action of debt for my money, because *by the bargain the property was in the buyer*." On this latter ground, therefore, I do not think that the sale is incomplete. And as the statute has been satisfied by a part delivery of the goods sold, accepted by the buyer, I think the contract of sale valid as far as respects the statute also, and that the rule for a new trial should be discharged."

Some of the judges on the bench conceiving that the Lord Chief Justice had questioned generally the authority of the case of *Simon v. Motivos*, desired to have it understood, that they concurred in the judgment delivered in this case, on the ground that a part-delivery of the thing bought (which they considered the delivery to and acceptance of the samples by the buyer to be in this case) took the case out of the statute; leaving the authority of that case to stand as it did before on its own ground, untouched and unsanctioned by the present decision. But the Lord Chief Justice declared, "that the only part of that case which he meant to question, though it was unnecessary at present to decide upon it, was the opinion thrown out that auctions were not within the statute, of which he should reserve his approbation for future consideration. But as to the other point there decided, that supposing sales by auctioneers or brokers to be within the 17th section of the statute, the auctioneer or broker must be taken to be the agent of both parties, the practice had become so settled, since the decision of that case, that it would be dangerous to shake it, and it was not his intention to question it."

So, a broker who is employed to sell goods for any person, and who agrees for the sale of them, and gives to the purchaser and to his employer a sale-note, is to be considered as agent for both parties, and such note is a sufficient note in writing within the statute of frauds.

Thus, in the case of *Rucker v. Cammeyer*, (v) which was an action of *assumpsit*, to recover the price of ten hogheads of sugar sold by the plaintiff to the defendant.

The case, as proved on the part of the plaintiff, was, that having a quantity of sugars to sell, that samples were sent (as is usual) to the plaintiff's broker. The broker was called and proved, that the samples were sent to him and exposed together with other samples of different sugars: that the defendant examined the samples, and fixed on those for which the action was brought: that he asked the broker from whence the sugars had come, and was answered, "that they came from the north—from *Scotland*." He asked the price, and was told 63*s. per cwt.* The broker said further, that he afterwards brought the plaintiff and defendant together, when he supposed the bargain was concluded, as he soon after received orders from the plaintiff to make out sale-notes of ten hogheads to the defendant at 63*s. per cwt.* These sale-notes he said contained the price and quantity of the sugar sold, and that one of them was usually given to the buyer, and the other to the seller. The plaintiff, he said, had his note from him, and the defendant had sent for his, which was delivered to him; soon afterwards the defendant sent back part of the sugar, saying, that he had contracted for new sugars, but that these were old. He said that at the time of the sale, the defendant made no inquiry whether the sugars were new or old.

The counsel for the defendant objected, that this contract was within the statute of frauds; he said that the broker being the agent of *Rucker* the plaintiff only, and there being no note in writing on the part of the defendant, either by himself or any agent authorised by him, nor proof of any direct and immediate contract of sale with him, that it therefore was void under the statute for want of a note in writing.

(v) 1 Esp. Rep. 105.

Lord *Kenyon* Ch. J. said, "that it was of great importance not to break in on any decision which had taken place on the statute of frauds, and cited the case of *Simon v. Motivos*, as ruling the present case. He said that the broker must be considered as the agent of both parties, and need not be constituted by writing, but that in this case he had in fact given the defendant a note in writing when he gave him the sale-note, which he had accepted."

But on a sale of *lands* by auction, the auctioneer is not considered as the agent of both parties; and therefore his entering the name of the buyer of a lot of land in his book as the purchaser, is not a note in writing within the 4th section of the act.

Thus, in the case of *Stansfield v. Johnson*, (*w*) the action was brought for not completing a purchase of copyhold lands, which had been put up for sale by auction: the defendant was the best bidder, the lot was knocked down to him, and being asked his name, he said *Johnson*, and his name was written in the catalogue against the lot, as the purchaser. The deposit not being then paid, was soon after demanded, but the defendant refused either to pay it or to complete his purchase, for which default the action was brought.

For the defendant it was insisted, that this was a case within the statute of frauds.

The counsel for the plaintiff cited the case of *Simon v. Motivos*; and insisted that the auctioneer was, under the authority of that case, to be deemed the agent of both parties, and his signing the name of the defendant against the lot, a note in writing within the statute.

Eyre Ch. J. was of opinion, that the case of *Simon v. Motivos*, applied to the sale of goods only, which was a distinct clause of the statute of frauds, and that the present case was expressly within it, and the plaintiff therefore could not recover.

So, in the case of *Symonds v. Ball*, (*x*) where the aftermath of land was sold by auction, by the Corporation of a Borough, and

(*w*) 1 Esp. Rep. 101. See also *Walker v. Constable*, 1 Bol. and Pul. 306. 2 Esp. Rep. 659. 7 Ves. jun. 345. S. P.

(*x*) 8 Term Rep. 151.

the town-clerk, who acted as agent for the sellers, wrote down the name of the purchaser in the printed catalogue, and the price to be given, for which the purchaser at the same time gave his promissory note. The aftermath was vested in the corporation by the stat. 34 Geo. III. which enacts, "that all the aftermath within the borough of *Launceston* common lands called *Hay* should be vested in the mayor and aldermen of the said borough for the time being in trust, nevertheless [to sell and dispose thereof, or otherwise to lease or demise the same by writing to any person, &c. for the best price or rent that could be had for the same."

It was objected that this was not a sale or demise in writing as required by the act of parliament. On the other side it was contended, that this was a sale and demise in writing, the town clerk having signed the agreement on the part of the corporation, and the plaintiff having on his part given a note in writing for the purchase-money : And the case of *Simon v. Mativos*, (y) was cited as being in point.

But the court were clearly of opinion, that neither the memorandum, so made by the town clerk, or the note given by the purchaser, could be deemed *a sale or demise in writing*, so neither could they be joined together for that purpose.

(y) *Ante*, 119.

CHAPTER V.

*Of the Stamping of Contracts, Agreements,
Bills, Notes, &c.*

THE statute 44 Geo. III. c. 98. after reciting, "Whereas the several rates and duties upon stamped vellum, parchment, and paper, and upon other articles and things under the care of the commissioners for managing the said duties, are become very numerous, intricate, and complicated, and it will tend to give facility to business, and contribute materially to the public benefit to consolidate and simplify the same;" enacts, "That from and after the 10th day of October 1804 all former duties shall cease; and (a) in lieu thereof the several sums of money and duties as they are respectively inserted, described, and set forth in the column of the schedules marked A. and B. intituled *England*; shall be raised, levied, collected, and paid.

The duties payable on agreements, &c. which are the subject of the present work, are all contained in schedule A. and are as follow :

SCHEDULE A.

"Award under hand and seal, or under hand only, made in *England*, and whether the same shall or shall not be inrolled of record in or made a rule of any court, upon any number of words therein, not amounting to thirty common law sheets (calculated at seventy-two words to each sheet), of which any such award shall consist — — — £.1 10 0
And for every entire quantity of fifteen common law sheets, (calculated at seventy-two words to each sheet), of which any such award, together with any schedule, receipt, in-

(a) Section a.

Witnessed,

strument; or other matter put or indorsed thereon or annexed thereto, shall consist, (over and above the first fifteen common law sheets), a further duty of £. 1 0 0

Charter-party, memorandum for charter, or any other instrument, note, letter, or other minument or writing, between the captain, master, or owner of any ship or vessel, and any merchant, trader, or other person, in respect to the freight or conveyance of any money, goods, wares, merchandize, or effects, laden or to be laden on board any such ship or vessel, upon any number of words therein, not amounting to thirty common law sheets, (calculated at seventy-two words to each sheet), of which the same shall consist — — — £. 1 10 0

And for every entire quantity of fifteen common law sheets, (calculated at seventy-two words to each sheet), of which any such charter-party, memorandum for charter, or any other instrument, note, letter, or other minument, or writing, last above mentioned, together with any schedule, receipt, instrument, or other matter, put or indorsed therein, or annexed thereto, shall consist, (over and above the first fifteen common law sheets), a further duty of — — — £. 1 0 0

Agreement made in England under hand only, where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only the evidence of a contract, or obligatory upon the parties from its being a written instrument, upon any number of words, not amounting to thirty common law sheets, (calculated at seventy-two words to each sheet), of which any such agreement shall consist — — — £. 0 16 0

And for every entire quantity of fifteen common law sheets, (calculated at seventy-two words to each sheet), of which any such agreement, together with every schedule, receipt, instrument, or other matter put or indorsed thereon or annexed thereto, shall consist, (over and above the first fifteen common law sheets), a further duty of — — — £. 0 16 0

Special Exemptions. (b)

Memorandum or agreement for any lease at rack-rent of any messuage under the yearly value of five pounds.

Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant.

(b) Vide 23 Geo. III. c. 58. s. 4. *where the like exemptions are made.*

Memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandize.

Memorandum or agreement made between master and mariners of any coasting vessel for wages.

Letter or letters, containing an agreement in respect of any merchandize, or evidence of such an agreement which shall pass by the post between merchants and other persons carrying on trade or commerce, and residing and actually being, at the time of sending such letters, at the distance of 50 miles from each other.*

Bill or note of lading for any goods or merchandize to be exported — — — — £. 0 3 0

Protest — — — — 0 5 0

Notarial act, any, whatsoever — — 0 5 0

Procuracion — — — — 1 0 0

Promissory note, or other note, for the payment of money to the bearer on demand (which may within three years after the date thereof, but not at a later period, be re-issued from time to time after payment at any place) where the sum expressed therein, or made payable thereby, shall not exceed one pound and one shilling — — — — £. 0 0 3

where the sum shall exceed one pound and one shilling, and not exceed two pounds and two shillings £. 0 0 6

where the sum shall exceed two pounds and two shillings, and not exceed five pounds and five shillings £. 0 0 9

where the sum shall exceed five pounds and five shillings, and not exceed twenty pounds — — £. 0 2 0

Bill of exchange, draft, order, or promissory or other note, for the payment of money to the bearer on demand, where the sum expressed therein, or made payable thereby, shall amount to forty shillings, and shall not exceed five pounds and five shillings — — — — £. 0 0 8

Bill of exchange, draft, order, or promissory or other note, payable otherwise than to the bearer on demand, where the sum expressed therein or made payable thereby, shall amount to forty shillings, and shall not exceed five pounds and five shillings — — — — £. 0 1 0

Bill of exchange, draft, order, or promissory or other note, for the payment of money where the sum shall exceed five pounds five shillings and not exceed 30*l.* — — £. 0 1 6
where the sum shall exceed 30*l.* and not exceed 50*l.* 0 2 0

* *Vide* 32 Geo. III. c. 51. where the same exemption is made.

where the sum shall exceed 50*l.* and not exceed 100*l.* £. 0 3 0

where the sum shall exceed 100*l.* and not exceed

200*l.* — — — 0 4 0

where the sum shall exceed 200*l.* and not exceed

500*l.* — — — 0 5 0

where the sum shall exceed 500*l.* and not exceed

1000*l.* — — — 0 7 6

where the sum shall exceed 1000*l.* — 0 10 0

Foreign bill of exchange (c) which shall be drawn in setts according to the custom of merchants, where the sum expressed in such bill, or made payable thereby, shall not exceed 100*l.* for each and every bill in each sett. — — £. 0 1 0

So drawn in setts, where such sums shall exceed 100*l.* and not exceed 200*l.* for each and every bill in each sett — £. 0 2 0

So drawn in setts, where such sum shall exceed 200*l.* and not exceed 500*l.* for each and every bill in each sett £. 0 3 0

So drawn in setts, where such sum shall exceed 500*l.* and not exceed 1000*l.* for each and every bill in each sett £. 0 4 0

So drawn in setts, where such sum shall exceed 1000*l.* for each and every bill in each sett — — £. 0 5 0

Conditional Exemption.

Bills of exchange, promissory and other notes and bills issued by the governor and company of the Bank of *England*, exempted on condition of the said governor and company paying yearly 32,000*l.*

Special Exemptions.

Drafts and orders for the payment of money to bearer on demand upon any banker, or person or persons acting as a banker, and residing or transacting the business of a banker within ten miles of the place at which such draft or order shall be drawn or given, and which place shall be expressed in or upon such draft or order.

Bill, remittance bill, certificate, and all other bills of what nature or description soever, drawn by commissioned officers, masters, or surgeons in the navy, for wages or pay, or by the commissioners of his Majesty's navy, or by the commissioners for victualling his

(c) *This clause can only relate to foreign bills drawn in this country, and not to such as are made abroad. Vide 7 Term Rep. 601.*

Majesty's navy, or by the commissioners for taking care of sick and wounded seamen, or by the commissioners for managing the transport service, upon and payable by the treasurer of his Majesty's navy.

By the statute 31st Geo. III. c. 25. f. 19. (which is still in force, except as to the duties, (d)) it is declared, that no bill of exchange, promissory note, or other note, draft, or order, nor any receipt, discharge, acquittance, note, or memorandum, unless duly stamped, shall be received in evidence in any court of justice whatever: and the commissioners of stamps are thereby prohibited from stamping any bill of exchange, &c. after it is issued. If, however, the commissioners exceed their authority, and stamp a bill, &c. after it is issued, it then becomes a valid instrument; and, in an action brought thereon, the court will not enquire how, and at what time it was stamped. *

By the statute 39 Geo. III. c. 107. sect. 4. (e) it is enacted, "That the duties thereby granted on any bill of exchange, promissory note, or other note, shall be paid by the person or persons giving the same." And by sect. 5., "No bill of exchange required to be stamped by that act, shall be re-issued under any pretence whatever."

By the stat. 43 Geo. III. c. 127. f. 5. (f) after reciting that by the statute 37 Geo. III. c. 136. f. 1. it is enacted, "that it shall be lawful for the commissioners, or their officer, upon payment of the duty and a penalty of five pounds in the said act mentioned, to stamp any vellum, parchment, or paper, whereupon any instrument, matter or thing, (except bills of exchange, promissory notes or other notes, drafts, or orders,) shall have been or shall be engrossed, printed, or written, liable in respect thereof to be stamped, with a stamp or stamps of a particular denomination or value, and whereon there is, or shall be impressed any stamp or stamps of a different denomination, but of an equal or greater value, in certain cases therein mentioned:" And in the same section, after reciting, "whereas it is expedient to permit the same to be done without payment of the said penalty," it is enacted, "that it shall

(d) Vide 44 Geo. III. c. 98. f. 8. * *Wright v. Riley*, Peake, 173.

(e) This section of the act is also in force by the 44 Geo. III. c. 98. f. 8.

(f) This and the following section are likewise in force by the 44. Geo. III. c. 98. f. 8.

be lawful for the said commissioners, or their officer from and after the passing of this act, to stamp, or cause to be stamped, any such vellum, parchment or paper (except as aforesaid) in any of the cases herein before mentioned, without payment of the said penalty of five pounds required by the said recited act; and every instrument, matter, or thing so stamped, shall have and be deemed of the like force and validity as if the said penalty of five pounds had been paid pursuant to the direction of the said act."

And by the 6th section of the same statute, it is enacted, "that every instrument, matter, or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual, provided such stamp shall be of the denomination required by law for such instrument, matter, or thing; any statute, law, or usage, to the contrary notwithstanding."

Before the passing of this statute, an action was brought upon a promissory note by the indorsee, and at the trial the stamp on the note appeared to be a *seven shilling deed stamp*. Lord Kenyon, Ch. J. held, that the note could not be received in evidence; and the plaintiff was accordingly nonsuited. (g)

So, in the case of *Chamberlain v. Porter*, (h) it was held, that a promissory note drawn before the 37 Geo. III. c. 136. upon a receipt stamp of equal value with that required for a promissory note, is not available in law.

Upon the clause of exemption in former acts, in favour of drafts drawn on bankers, it has been holden, (i) that the person on whom a draft is drawn, must be a *bona fide* banker; and that a draft on a banker, post-dated, and delivered before the day of the date, though not intended to be used till that day, must be stamped. And, according to the special exemptions in the 44 Geo. III. c. 98. (k) the place where the draft is drawn, ought to be truly stated.

By the stat. 44 Geo. III. c. 98. s. 20. it is enacted, "That no promissory note or other note for the payment to the bearer on de-

(g) *Manning v. Lavis*, sittings after Mich. Term, 1796. *Bayley on Bills*, 20. 2 ed. See also *Farr. v. Price*, 1 East Rep. 55. 8. P.

(h) 1 New Rep. C. B. 40. But see *Taylor v. Hagen*, 2 East Rep. 414.

(i) *Allen v. Kewer*, 1 East Rep. 435. *Whitwell v. Bennett*, 3 Bos. and Pul. 559. (k) *Vide ante*, 133.

mand, of any sum of money exceeding the sum of twenty pounds (save and except promissory notes or other notes for the payment by or on account of the Bank of Scotland, or Royal Bank of Scotland, or the *British linen company*, to the bearer on demand, of the sum of one hundred pounds,) shall be re-issued on any pretence whatever; but when and as soon as any such note for the payment of any sum of money exceeding twenty pounds, save and except such note, for one hundred pounds as aforesaid, shall be paid by or under the order or authority of the person or persons by whom or on whose account the same was signed, or his, her, or their executors, administrators, or assigns, or in pursuance of any direction, nomination, or appointment for the payment thereof, contained or expressed in or upon any such note, the same shall be taken and construed to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or transferable to any intent or purpose whatever, but shall be forthwith cancelled; and if any person or persons shall issue, utter, or negotiate, or cause to be issued, uttered or negotiated, any such promissory note, or other note after any such payment thereof as aforesaid, or if any person or persons, by whom such payment as aforesaid, shall be made, shall neglect or refuse to cancel the same, or cause the same to be cancelled, every such person or persons so offending shall, for every such offence, forfeit the sum of twenty pounds."

And by the 24th section of the same act it is enacted, "That in any case where it shall appear to the commissioners of his Majesty's stamp duties, upon oath or affirmation, to be made before any one or more of the said commissioners, or otherwise to their satisfaction, that any instrument, matter, or thing whatsoever, except bills of exchange, promissory notes or other notes, drafts, orders, or receipts, required by law to be stamped, hath not been duly stamped with a stamp of the value by this act required, either by accident or inadvertency, or from urgent necessity or unavoidable circumstances, and without any wilful delay or intention in any party to evade the duties by this act imposed, or to defraud his Majesty thereof, and such instrument, matter and thing shall be brought to the said commissioners to be stamped within twelve months after the making or execution thereof, it shall be lawful for such commissioners to remit the penalty, or any part thereof, as they shall deem expedient."

It should here be observed, that the cases which will be brought before the reader in the remaining part of this chapter have all been

been determined upon former stamp acts. But as those acts relate to duties payable on the same kind of instruments as are mentioned in the present stamp act, 44 Geo. III. c. 98., and as this act uses nearly the same words as the former acts, it is conceived the following cases will be found useful in the construction of the present stamp act. I shall therefore consider them in the following order :

1. *Of Agreements made Abroad.*
2. *Of a written Acknowledgement of a Debt.*
3. *Of distinct and separate Agreements on one Stamp.*
4. *Of altering an Agreement, &c. after it is executed.*
5. *Of the Exemption of the Duties upon Contracts relating to the Sale of Goods.*
6. *Of the Exemption of the Duties upon Letters passing by the Post between Merchants and others, &c.*

1. *Of Agreements made Abroad.*

In the case of *Ximenes v. Jaques*, (1) a wager was made of 100 guineas, and the expences of travelling "that the plaintiff would not go 240 miles in 24 hours, in a post-chaise and pair of horses, being allowed to change post-chaises and horses as often as he pleased; the expences not to exceed the usual expences of travelling on the post-roads in *England*. The plaintiff performed the journey in 21 hours and a half.

The plaintiff and defendant were officers on board the *Belvidero* East Indiaman; the wager was made at sea, and the paper containing the particulars of it was dated "Ship *Belvidero* October 2, 1793, long. 63. lat. 37.;" and the agreement had been, in fact, there reduced into writing.

This paper was produced, and not being stamped, was objected to, on the ground that the declaration being on an agreement, the paper containing that agreement should have an agreement stamp.

It was answered, that the agreement bore date at sea, and therefore not being made within this kingdom, a stamp was not required.

(1) 1 Esp. Rep. 311.

Lord *Kenyon*, Ch. J. was of that opinion, and received the agreement.

So, in the case of *Winbled v. Malmberg*, (m) which was an action of *assumpsit* for seamen's wages. The plaintiff and defendant were both *Swedes*, and the vessel a *Swedish* vessel.

On the trial, a paper was produced which was made originally in *Sweden*, it contained the ship's articles, with the names of the seamen on board, and the wages they were to receive. It also contained an account of any change that took place in the crew, such as, if any of them had deserted, those who had been hired in their stead, in the course of the voyage: Among others, the plaintiff had been hired in *London* on the 1st of *June* 1705; his name was there found entered, and the entry of the wages he was to receive was four dollars *per* month.

By the regulations of the court of *Sweden*, this paper is lodged in the consul's hands in *London*.

It was contended for the plaintiff that this paper should not be given in evidence, as it was offered in proof of an agreement for a hiring at a certain rate, and was not stamped.

Eyre, Chief Justice, over-ruled the objection. His lordship said, it was not an agreement between the parties, but a regulation made by the court of *Sweden* for public purposes, and evidenced by their consul.

But if an instrument be executed in a foreign country, and by the laws of that country a stamp is required, the party who holds it cannot recover upon it in this country, unless it is stamped with the proper stamp required by the laws of the foreign country.

Thus, in the case of *Alves v. Hodson*, (n) which was an action by the plaintiff, who was a sailor, against the defendant, who was a captain of a *West India* ship, called the *Neill Malcolm*, to recover the amount of wages for the voyage or run from *Jamaica* to *London*. On the trial, it was proved that the defendant engaged the plaintiff on the 25th day of *July* 1796, at *Squannab le Mar*, in *Jamaica*, for the homeward voyage, for the sum of 50 guineas, and gave him the following note:

(m) 1 Esp. Rep. 454.

(n) 2 Esp. Rep. 528. 7 Term Rep. 241. S. C.

" Three days after the arrival of the ship *Neill Malcolm* at her moorings in the river *Thames*, I promise to pay *William Alves* 50 guineas, if he does his duty as an able seaman on board the said ship.

" *Jamaica, July 25, 1796.*

J. Hadson."

The plaintiff proved the defendant's hand-writing to the note, and the necessary averments in the declaration which entitled him to recover.

In answer to this case the defendant called a clerk, from the office of the secretary of state, who produced the acts of assembly of the island of *Jamaica*, by one of which a stamp duty of 1s. 3d. was imposed on every sheet, or piece of paper, whereon was written any promissory note above 20l. and not exceeding 50l., and so progressively. The note in question not being stamped, the counsel for the defendant contended it could not be given in evidence.

On the other side it was contended, that this was a mere revenue law of that country, by which the courts of this country were not bound.

But Lord *Kenyon* Ch. J. said, " In deciding on instruments made abroad, I think we are bound to consider the laws of that country where the contract is made; and if they are not obligatory by such laws, they cannot be enforced here. By the law of *Jamaica*, given in evidence, the instrument produced would be invalid for want of a stamp. I am therefore of opinion, that we cannot give it validity here. However, let the plaintiff take a verdict, with liberty for the defendant to set it aside, and that a nonsuit be entered."

In the following term a motion was made to set aside the verdict, and for leave to enter a nonsuit. The court were of opinion, that the paper writing was a promissory note, though not negotiable, and as it was not stamped, according to the laws of *Jamaica*, it could not be received in evidence. But as there was a count upon a *quantum meruit* which was not considered at the trial, the court ordered a new trial in order to give the plaintiff an opportunity of recovering on that general count.

2. Of a written Acknowledgement of a Debt.

A mere written acknowledgement of a debt need not be stamped.

Thus,

Thus, in the case of *Fisher v. Leslie*, (o) which was an action formoney lent, and for money due on account stated. And to establish part of the demand, the plaintiff produced a slip of paper, signed by the defendant in the following form: "I. O. U. eight guineas." It was contended, on behalf of the defendant, that this paper ought to have been stamped either as a promissory note, or a receipt for money.

But Eyre, Ch. J. said, that he was of opinion, that it was merely an acknowledgement of a debt, and neither a promissory note, or a receipt; and admitted it in evidence.

3. Of distinct and separate Agreements on one Stamp.

In the case of *Robson v. Hall*, (p) which was an action of *assumpsit* on an agreement, whereby the defendant "betted the plaintiff 150*l.* to 100*l.* that he did not find two geldings to trot 32 miles in two successive hours, carrying the said Mr. *Robson*, and no one else." It was afterwards, by an indorsement on the agreement, agreed, "that the bet should be doubled."

The declaration contained, 1st. a count on a bet of 300*l.* to 200*l.*; 2dly, on the 1st bet of 150*l.* to 100*l.*; and lastly, a count on another bet of 150*l.* to 100*l.*

There was, however, but one stamp on the agreement, and it was objected that there ought to have been two stamps; for that they were distinct and separate transactions.

And of this opinion was Lord *Kenyon*, Ch. J. But he ruled, that as there was a count on each agreement, the plaintiff might recover one sum of 150*l.* on the agreement which was stamped.

4. Of altering an Agreement, &c. after it is executed.

When a bill of exchange, or written agreement has been once executed by the parties, any subsequent alteration therein will require a new stamp.

(o) 1 Esp. Rep. 426.

(p) Peake's Cas. N. P. 127.

Thus,

Thus, in the case of *Bowman v. Nichol*, (9) which was an action by the indorsee of a bill of exchange against the acceptor. It appeared, at the trial, that the bill, which was drawn on a proper stamp, was originally dated on the 2d of *September* 1793, payable twenty one days after date, and while it continued in the hands of the drawer it was altered, with the consent of the acceptor, to be made payable fifty-one days after date, and with the like consent was again restored to twenty-one days after date, and the date of it brought forward from the 2d to the 14th *September*. This last alteration was made on the 30th *September*, the bill being then over due, according to the original tenor of it. After all these alterations it was negotiated, and came into the hands of the plaintiff. The objection taken at the trial was, that the last alteration made it to all intents and purposes a new bill, and therefore it ought to have been drawn on a new stamp; otherwise, after a bill had been once drawn on a proper stamp between the same parties, they would never make use of a new stamp again for any subsequent transaction of that sort; but it would only be necessary for them to alter the dates, and give the instrument a new currency.

Lord Kenyon, Ch. J. was of this opinion, and nonsuited the plaintiff.

And the court, upon a rule obtained to show cause why the nonsuit should not be set aside, were clearly of opinion, that the nonsuit was proper; for that, at the time when the last alteration was made the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; and that therefore there ought to have been a new stamp.

8 last
273, 37
9 last 351
10 last 431

5. *Of the Exemption of the Duties upon Contracts relating to the Sale of Goods.*

Upon the exemption made in the stat. 23 Geo. 3. c. 58. s. 4. relating to the sale of goods, (and which is precisely the same as that contained in the 44 Geo. 3. c. 98.) it has been determined, that an agreement to indemnify from any loss on the resale of

(9) 5 Term Rep. 537. 1 Esp. Rep. 81. S. C. See *Stonlake v. Babb*. 5 Bur. 2673. S. P. and see the stat. 35 Geo. III. c. 63. s. 13. where it is expressly provided that (under certain restrictions) any alteration in a policy of assurance, after it is executed, shall not require an additional stamp duty.

goods purchased by a broker for his principal, need not be stamped, it being a contract relating to the sale of goods.

Thus, in the case of *Curry v. Edensor*, (r) the plaintiff, through the medium of the defendant his broker, had made two purchases of cotton, the one of 50 bags from *Bateman*, the other of 40 bags from *Entwistle*: and the defendant engaged for half *per cent.* to indemnify the plaintiff from any loss on the resale of them.

At the trial, before Lord *Kenyon*, the plaintiff gave parol evidence of the contract of indemnity between him and the defendant; and for further proof called upon the defendant to produce his book, upon inspection of which it appeared that the defendant had entered a minute of the contract between the plaintiff and *Bateman* and *Entwistle*, for the purchase of the cottons, at the bottom of which had been written the letter "G," which was a private mark of the defendant's, and was explained by his clerk to mean *guarantee*. It was objected, on the part of the defendant, that this entry, having been produced as written evidence of the contract, ought to have been stamped by virtue of the 23 Geo. 3. c. 58. which requires a stamp on every piece of paper upon which any agreement shall be written, whether the same shall be only evidence of the contract, or obligatory on the parties from its being a written instrument.

This question was reserved for the opinion of the Court of *King's Bench*, and upon argument it was observed by the counsel for the defendant, that the written entry ought to have been stamped, by virtue of the first section of the act, and could not be considered as coming within the exemption in the fourth section, which meant only contracts relating to the sale of goods *as between vendor and vendee*, and could not be taken to extend to other than the contracting parties.

But the court were of opinion, that this was not such an agreement as was required to be stamped: for it was made at the time of the original contract of sale of the goods, and *related to the sale of them*.

But an agreement between merchants, that one shall take a share in the outfit of a ship and the adventure, is not an agreement for or relating to the sale of goods, within the proviso contained in the 4th section of the 23 Geo. 3. c. 58. (s)

(r) 3 Term Rep. 534.

(s) *Vide Leigh v. Bannet*, 1 Esp. Rep. 403.

So, in the case of *Waddington and others v. Briflow and others*, executors of *Simmons*, (1) which was in action of *assumpsit*, for breach of the following agreement :

" Agreed this 13th of *November* 1799, to give the undermentioned gentlemen at the rate of 1*ol.* per 100 weight, for the quantities of hops as attached to their respective names, to be in pockets and delivered at *Whistable*.

(Signed,) *Henry Simmons*, *Wm. Francis*, all his growth
Wm. Francis, &c. &c. about 23 acres.

(Here followed several other *Henry Simmons*, do. 22.

signatures.)

(Here followed several other names with their respective quantities.)

(Signed) *S. F. Waddington & Co.*"

On the trial it was proved, that it was customary in *Kent* for purchasers of hops to enter into agreements while the hops are growing for the delivery at a future time, and that when no particular time is specified in such agreements for the delivery, it is understood to be within a reasonable time after the hops are picked and dried. On the production of the above agreement it was objected that it could not be received in evidence, inasmuch as it was not stamped; and the learned judge (2) being of that opinion, the plaintiffs were nonsuited.

And the Court of *Common Pleas*, upon a rule to set aside the nonsuit, concurred in opinion with his lordship: the rule was therefore discharged.

Lord *Alvanley*, Ch. J. said, " By this contract the vendor undertook to sell to the plaintiffs the whole produce of twenty-two acres in his possession, and if he had sold one bushel to any other person, he would have been liable to an action. He agreed to sell the whole produce of the land in a certain state: the first term of the agreement is, that he will sell the whole produce of the land; and the second, that it shall be in a certain state at the time of delivery. It is therefore an agreement for the sale of goods, wares, and merchandise, and *something more*: I think the agreement is not within the exemption of the statute."

Heath, J. " It appears to me that the subject matter of this agreement must be taken with reference to the time at which the contract was made. Now at that time the hops did not exist in the state of goods, wares, and merchandise."

(1) 2 Bos. and Pol. 459. (2) *Hotham*,

Rooke, J. "The object of the legislature in introducing the exception of the 4th section was to prevent the duty which had been imposed by the 1st section upon all agreements generally, from impeding ordinary commercial transactions. But the subject of the present agreement is a speculative bargain relative to things not in *esse* at the time when the contract was made. It does not appear to me therefore to fall within the meaning of the exception."

Chambre, J. "There is a little ambiguity in the terms of this agreement, but that has been cleared up by the parol testimony. Indeed the declaration puts the matter beyond all doubt, for it states the contract to be for the specific produce of twenty-two acres of land, alledged to be in the possession of the vendor. Now the statute only exempts contracts for the sale of goods, wares, and merchandises. But this contract gives the vendee an interest in the whole produce of that part of the vendor's farm which consists of hop grounds. If the vendor had grubbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. Though I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods, wares, and merchandises, at the time of the contract made; yet I cannot think the present agreement within that exemption, since it gives an interest to the vendee in the produce of the vendor's land."

So, in the case of *Buxton* and another v. *Bedall* and another, (v) which was also an action upon the following agreement:

"*Joseph and Thomas Bedall*, order of *Buxton and Campsley*, four mules, 228 spindles each, 3 wheels, 16 inch rollers, and one 15 inch, 13 inch spindles, iron top roller, a sufficient number of change pinions, twist wheels from 30 to 42 teeth, advancing two each time, a set of clearers for each wheel, leaded and covered. The wheels are to be complete and good 5s. 9d. per spindle; payment half ready money, and the remainder in three months; a dozen of change rollers for each wheel to be given in. Two to be made in six weeks, and the remaining two in eight weeks from this time.

"*Manchester*, 11th Nov. 1801. *Joseph and Thomas Bedall*."

The Court of *King's Bench* were of opinion "that this contract did not come within the exception of the act, and therefore ought to be stamped, being a contract not for or relating to the *sale*, but to the *making* of goods, and for work and labour to be done. It was a contract *in fieri*; as in the case of *Towers v. Osborne*, (w) where the defendant having bespoke a chariot which he refused to take when it was made, it was objected to an action brought to recover the value of it that the case was within the statute of frauds, nothing being given for earnest nor any note in writing; but the lord chief justice ruled it not to be within the statute, which related only to contracts for the actual sale of goods, which that was considered not to be, but a mere executory contract for work to be done. That in the case of *Curry v. Edensor*, (x) the agreement related to the *sale* of goods then made."

See post 2
(amp. N.C.)

6. *Of the Exemption of the Duties upon Letters passing by the Post between Merchants and Others, &c.*

In the case of *Mackenzie v. Banks*, (y) which was action on the defendant's undertaking to pay the debt of his mother, who was in trade. The debt arose in the course of her business, which the defendant assisted her in carrying on, though without any share in it. The evidence of the undertaking was a letter written by the defendant to the plaintiff. And the question was, whether it ought to have been stamped, as all agreements in writing are required to be by the 23 Geo. III. c. 58. "whether the writing be "only evidence of the contract, or obligatory upon the parties "from its being a written instrument;" or whether this letter came within the exception of the 32 Geo. III. c. 51. s. 1. by which it is provided that the first mentioned act "shall not extend to "make liable to the said stamp duty any letter passing by the post "between merchants, or other persons carrying on trade or commerce in "this kingdom, residing at 50 miles distance from each other." At the trial, the letter had been received in evidence unstamped by Lord Kenyon, Ch. J. and the plaintiff obtained a verdict.

A motion was afterwards made to set aside the verdict, on the ground that the letter did not fall within the terms of the exception in the latter statute. And it was argued that the defendant was neither a merchant or trader: he had no concern in his mother's

(w) 1 *Sira*. 506. et ante 92. (x) *Vide ante* 142. (y) 5 *Term Rep.* 176.

business. The letter was not written by him as agent for his mother, in which case, perhaps, the exception might have extended to him, but in his own individual character to pay the debt of another. His promise therefore was like that of any other indifferent person. The legislature only intended to protect persons, whose ordinary business led them to write to each other in the course of their own particular callings. A person, who was not a trader, although he wrote a letter concerning some trading contract, would not be within the words or meaning of the exemption.

Per Curiam. "It appears in evidence that the defendant did carry on the business for his mother, and that this debt arose in the regular course of the trade. And therefore any letter written by him on account of that very trade, whereby he bound himself to another tradesman, may fairly be construed to fall within the letter and spirit of the act; which meant that the correspondence of merchants and tradesmen at a distance from each other, on the faith of which they had considerable dealings, should not be fettered with stamps."

PART THE SECOND.

OF THE

PARTIES TO A CONTRACT, AND THEIR REPRESENTATIVES, &c.

In this part of the Work it is intended to show what persons may or may not contract and bind themselves, or others for whom they contract; and also how far the representatives of the contracting parties are bound by the contract of the persons whom they represent. The subject, therefore, will be treated in the following order:

1. *Of Infants.*
2. *Of Married Women; and of the Husband's liability to Contracts made by the Wife before and after Marriage.*
3. *Of Master and Servant.*
4. *Of Principal, Factor, and Agent.*
5. *Of Agents of Government, &c.*
6. *Of Partners.*
7. *Of Owners and Masters of Ships, and of Seamen.*
8. *Of Parish Officers.*
9. *Of Trustees.*
10. *Of Assignees of a Bankrupt.*
11. *Of Executors and Administrators.*

CHAPTER I.

1. Of Contracts with Infants.

BY the common law a person is called an infant till the age of 21 years. (a) And all contracts with infants, except for necessities, are either void or voidable : (b) the reason of which is, the indulgence the law has thought fit to give infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing them from being imposed upon or overreached by persons of more years and experience. (c)

Therefore, if an infant be in trade, and contract a debt in buying goods, &c. for his trade, it is not recoverable against him, though he thereby gains his living.

Thus, in the case of *Whittingham v. Hill*, (d) which was an action of *assumpsit* for goods sold ; the defendant pleaded that he was an infant : the plaintiff replied that the goods were for the necessary diet and apparel of the defendant and his family ; the defendant rejoined that he kept a mercer's shop at *Shrewsbury*, and bought the goods to sell again, and traversed that he bought them *pro necessario*, &c. : the plaintiff thereupon demurred. And, after argument, it was adjudged for the plaintiff. But afterwards, upon a writ of error, the judgment was reversed. *Et per Curiam* : " This buying for the maintenance of the defendant's trade, though he gain thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but for his necessity, viz. diet and apparel, or necessary learning."

But it is said, (e) Mr. Baron *Clarke* in such an action before him, where the defendant gave his non-age in evidence, it appearing he

(a) *Co. Lit.* 171. b. (b) *Com. Dig. tit. Infant, B. 5. C. 2.*

(c) *Bac. Abr. tit. Infancy and Age, I. 3.*

(d) *Cro. Jac.* 494. 2 *Rol. Rep.* 45. See also 1 *Rol. Abr.* 729 l. 15.
Dy. 104 b. n. 13. *S. C.* (e) *Eul. N. P.* 154.

had been set up in a farm, and bought sheep of the plaintiff in the way of farming, directed the jury to give a verdict for the plaintiff, and said he thought the law ought not to put it in the power of infants to impose upon the rest of the world. And the *Scotch* law is agreeable to this determination. (f)

However, in the case of *Whywall v. Champion*, (g) *Lee*, Ch. J. ruled, "That goods sent to the defendant, who had set up a shop in the country, could not be recovered for as necessaries, he appearing to be an infant; for the law will not suffer him to trade, which may be his undoing."

So, in the case of *Dilk v. Keighley*, (h) which was an action of *assumpsit* to recover a sum of money due for work and labour. On the trial, it appeared, that the plaintiff was a writing painter, and the defendant a glazier and painter, and the work was done by the plaintiff in the way of his trade, in painting and gilding letters for the defendant's customers. It also appeared that the defendant was an infant.

On the case being opened, Lord *Kenyon*, Ch. J. expressed an opinion that the action was not maintainable, the plaintiff's counsel having admitted the infancy.

It was contended by the plaintiff's counsel, that those things were to be deemed necessaries by which an infant gained his living: that in the present case the defendant carried on trade on his own account, and the work having been done for his customers, for which he himself had been paid, and whereby he lived, was to be deemed necessaries for which he should be liable.

Per Lord *Kenyon*, Ch. J. "The law will not allow an infant to trade. The substratum of the present action is, therefore, that which by law cannot be done. No action can therefore be maintained for work done in the course of it."

And the rule of law is said (i) to be the same in regard to a debt incurred in repairing houses belonging to an infant.

So, a bill of exchange or other written contract made by an infant, except for necessaries, is voidable by the infant.

Thus, in the case of *Williams v. W. Harrison and R. Harrison*, (k) which was an action brought upon a bill of exchange drawn

(f) Vide *Erskine's Principles*, l. 1. tit. 7. §. 21.

(g) *Stra.* 1083. (h) 2 *Esp. Rep.* 480.

(i) 3 *Salk.* 196. *Sed quare*, vide, 3 *Bur.* 1717. 2 *Bulstr.* 69.

(k) *Carth.* 160. *Holt.* 359. *S. G.*

*And for new
too, if a bill of
exchange, see the case*

by the defendants, and protested for non-payment. *R. Harrison*, one of the defendants, pleaded infancy in bar; to which the plaintiff demurred, upon the ground that infancy was no bar to this action, it being founded on the custom of merchants.

But the court, without argument, over-ruled the demurrer, for they clearly held, "that infancy was a good bar notwithstanding the custom; for here the infant is a trader, and the bill of exchange was drawn in the course of trade, and not for any necessities; so judgment was entered, that the plaintiff *Nil capiat per Billam versus R. Harrison*.

And *Holt*, Ch. J. cited a case, "That where an infant keeps a common inn, yet an action on the case upon the custom of inns will not lie against him, which is stronger than the principal case."

But, although a bill be drawn, indorsed, or accepted, by a person under age, it will nevertheless be valid against all other persons who are competent parties to the instrument. (l)

If an infant submit a matter to arbitration, and an award is made against him, he may perform the award, or avoid it at his election, as he may all other his contracts. (m)

A contract made with an infant cannot be converted into a tort so as to make him liable in that form of action.

Thus, if one deliver goods to an infant upon a contract, &c. knowing him to be an infant, he shall not be chargeable in trover and conversion, or any other action for them; for the infant is not capable of any contract, but for necessities; therefore, such delivery is a gift to the infant: but if an infant without any contract wilfully takes away the goods of another, trover lies against him: it is also said, that if he take the goods under pretence that he is of full age, trover lies, because it is a wilful and fraudulent trespass. (n)

So, in the case of *Jennings v. Rundall*, (o) which was a special action on the case in tort; and the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, but that the defendant maliciously intending, &c. wrongfully and injuriously rode the mare so that she was da-

(l) *Taylor v. Croker*, 4 *Esp. Rep.* 187. See also 2 *Atk.* 181, 2.

(m) *Lac. Abr.* tit. Infancy and Age, l. 3.

(n) See 1 *Sid.* 129. 1 *Lev.* 169. *Kebl.* 905. 913. (o) 8 *Term. Rep.* 335.

maged, &c. It was holden, that the defendant might plead his infancy in bar, the action being founded on a contract.

And Lord *Kenyon*, Ch. J. said : " The law of *England* has very wisely protected infants against their liability in cases of contract ; and the present case is a strong instance to show the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey ; the plaintiff let him the mare to hire ; and in the course of the journey an accident happened, the mare being strained ; and the question is, whether this action can be maintained ? I am clearly of opinion that it cannot ; it is founded on a contract. If it were in the power of a plaintiff to convert that, which arises out of a contract, into a tort, there would be an end of that protection which the law affords to infants. Lord *Mansfield*, indeed, frequently said that this protection was to be used as a shield, and not as a sword ; therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words " wrongfully, injuriously, " and maliciously," introduced into this declaration, cannot vary this case."

Gryse, J. " I am of the same opinion. In the case of *Manby v. Scott*, (p) this distinction was taken, that if the action against an infant be grounded on a contract the plaintiff shall not convert it into a tort ;" If one deliver goods to an infant on a contract knowing him to be an infant, the infant shall not be charged for them in trover and conversion ; for by that mean all infants in *England* would be ruined." A very few years after the decision of that case the case of *Johnson v. Pye* (q) arose, according to one report of which (r) Lord Ch. J. *Keeling* expressed great indignation at the attempt to charge an infant in tort, for that which was the foundation of an action of *assumpsit* ; he said, " The judgment will stay " for ever, else the whole foundation of the common law will be " shaken ; for this was but a slip, and he might have pleaded his minority here."

But, an action of *assumpsit* will lie against an infant to recover money embezzled by him.

(p) 1 Sid. 129. et ante 150.

(q) 1 Keb. 905.

(r) Ibid.

Thus, in the case of *Brislow* and others, assignees, &c. v. *Eastman*, (i) which was an action of *assumpsit* for money had and received to the use of the bankrupts before they became bankrupts.

The defendant had been apprentice to the bankrupts, who were merchants, and, during his apprenticeship, had been entrusted by them to make entries at the custom-house, and pay other sums of money on their account. He had frequently charged larger sums of money than those he actually paid, and the present action was brought to recover back the over-charges.

The defendant attempted to defend himself, on account of his being an infant at the time.

Lord *Kenyon*, Ch. J. said, "The question was new, and had not been decided; but he was of opinion that this action, though in form arising *ex contractu*, in fact arose *ex delicto*, and as he could not have defended himself by reason of his infancy if an action of *trover* had been brought for the money, so he ought not to be permitted to defend himself on that ground, in this action."

The plaintiffs, however, proved that the defendant acknowledged the fraud, and promised payment after he came of age, so that the point was not determined; the plaintiffs obtaining a verdict on this evidence.

As to the acts of infants being void or voidable, it is said, (s) there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it only, that the first is voidable, but the last absolutely void; as if an infant deliver a horse or a sum of money with his own hands, this is only voidable, and to be recovered back in an action of account. But if an infant agrees to give a horse, and does not deliver the horse with his hand, and the donee takes the horse by force of the gift, the infant shall have an action of trespass, for the grant was ^{actually} void.

It is also laid down as a general rule, (u) that infancy is a personal privilege, of which no one can take advantage but the infant himself; and therefore, though the contract of the infant be void-

(s) *Peake's Cas. N. P.* 223. 1 *Esp. Rep.* 172. *S. C.*

(t) *Bac. Abr. tit. Infancy and Age*, l. 3. And see *Perk. f.* 12. 19. *Roll. ibr.* 730. l. 5. 2 *Roll. Rep.* 408. *Latch.* 10.

(u) 1 *Show.* 171. 3 *Med.* 248. See also *Bac. Abr. tit. Infancy and Age*, l. 4.

Powell
ntv. 33.
Dig. Ex. 1.
243.

able, yet it shall bind the person of full age; for being an indulgence which the law allows infants, to protect and secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of full age who are presumed to act with sufficient caution and security; and were it otherwise, this privilege, instead of being an advantage to the infant, might in many cases turn greatly to his detriment.

Therefore it hath been adjudged, (v) that if an infant let a house to J. S., an adult, reserving rent; and the rent be in arrear, the infant may distrain for the rent, or bring an action of debt; though it should be objected that such a contract, is not reciprocal.

So, where an infant brought an action on the case by her guardian, and set forth, (w) that she gave the defendant 10*l.* and put herself to be her servant for seven years, and that, in consideration thereof, the defendant promised to find her with all necessities, save only apparel, and likewise promised to teach her to sing and to dance; and that the defendant, within the time turned her out of the house, and did not teach her to sing and dance; whereupon there was judgment by default, and a writ of enquiry of damages: it was moved to stay the filing of the writ of enquiry because here was no consideration, the agreement not being reciprocal; but the court held, that, though the contract might be void as to the infant, yet it bound her mistress, who was of full age; and therefore ordered the writ of inquiry to be filed.

So, where an infant brought an action of *assumpsit*, by his guardian, and declared, (x) that whereas the defendant entered into his close, and cut his grass; that in consideration the plaintiff would permit him to make it into hay, and carry it away, the defendant promised to give him six pounds for it. To this declaration the defendant demurred, upon the ground that there was no legal consideration to support the promise; for the infant was not bound by his permission, but might sue the defendant for the trespass notwithstanding. The court, however, gave judgment for the plaintiff.

So, in a similar action upon a promise to pay the plaintiff, an infant, the value of certain land, in consideration that he would suffer the defendant to hold and enjoy it, after the death of A. to

(v) 1 Sid. 446. 1 Mod. 25.

(x) 1 Poph. 51. 1 Mod. 25.

(w) 1 Sid. 446. 2 Keb. 623.

the time of his full age; the plaintiff had judgment, although it was agreed that he was not bound by the contract, (y)

So, on a promise to an infant to do such an act, in consideration that the infant promised to pay such a sum; in an action of *assumpsit* by the infant, he had judgment, though the money was not paid; for the court held, that the infant's promise was only voidable at his own election, and not at the election of him to whom it was made, (z)

So, if a man of full age and a female of fifteen promise to intermarry, and after request by her, he marries another woman, an action on the case lies against him for the violation of the contract; for though it was objected that this was *nudum pactum* and not reciprocal, as the man could not compel her, being an infant, to perform her promise, yet being voidable as to herself only, as she finds it for her benefit, it shall bind him, being of full age. (a)

If an infant lose money at play, which the winner takes, such taking is a conversion, and trover and conversion lies for the infant for the sum so received; but if the infant had won, he might have retained the money, and no action would have laid against him for it. (b)

Of Contracts for Necessaries.

It is clearly agreed in all the books, that if an infant makes a contract for necessaries it is neither void nor voidable. (c) Indeed if this could be done, it is truly observed (d) "that miserable must the condition of *minors* be; excluded from the society and commerce of the world; deprived of necessaries, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their own benefit, and without prejudice to themselves, for the benefit of others."

(y) 2 Sid. 109. (z) 1 Sid. 41. 1 Keb. 1.

(a) 2 Stra. 937. Fitzg. 175. 279. (b) Cited in 2 Stra. 937. Fitzg. 279.

(c) Co. Lit. 172. a.

(d) Per Lord Mansfield, 3 Burr. 1801.

Therefore

Therefore if an infant contracts for his necessary diet, apparel, washing, lodging, or education, it shall bind him. (e)

So, if he contracts for physic, or for his cure with a surgeon when he is wounded. (f)

So, if he be a housekeeper and contracts for necessaries for himself, his wife, and family. (g) But an infant is not liable for necessaries provided in order for his marriage. (h)

So, a contract to pay so much *per annum* for his diet and schooling. (i)

So, a promise by an infant, in consideration that A. had expended 7*l.* for his diet and teaching, to pay him that sum. (k)

Instructing an infant in a useful trade, seems to fall within the description of *necessaries*. (l)

A captain in the army, being under age, is liable to pay for a livery ordered for his servant, as necessaries, but not for cockades ordered for the soldiers of his company.

Thus, in the case of *Hands v. Slaney*, (m) which was an action for goods sold and delivered, it appeared that the goods in question were a livery for the defendant's servant, who was a captain in the army, and cockades for some of the soldiers belonging to his company, which were furnished by the plaintiff at the defendant's request. The defendant, who was a minor, relied upon his infancy, insisting that the goods in question were not within the description of necessaries; for which only he was liable. But *Lord Kenyon*, before whom the cause was tried, left it to the jury to consider whether the livery for a servant were not necessary and suitable to the plaintiff's degree, and the cockades a necessary expence incidental to his situation; and the jury being of opinion that they were, found a verdict for the plaintiff. Barn (Hambro)

But a motion for a new trial was afterwards made. The court, however, were of opinion, that the livery for the defendant's servant was necessary to the defendant's station in life; but that the cockades could not come within that description.

Lord Kenyon Ch. J. said, "The cockades cannot be considered as necessaries for the defendant, and ought not to have

(e) *Co. Lit.* 172. a. *Sir W. Jones*, 146. 182. 1 *Roll. Abr.* 729. l. 5. 6. 30. 35. *Latch.* 157. *Dy.* 104. b. in marg. 1 *Sid.* 112. *Mar.* 40.

(f) *Co. Lit.* 172. a. *Pal.* 528.

(g) 1 *Sid.* 112. *Cart.* 215. 1 *Str.* 168. (h) *Ibid.*

(i) 1 *Roll. Abr.* 729. l. 35. *Pal.* 525. (k) *Sir W. Jones*. 182.

(l) See 1 *Woodeson's Lec.* 402. n. f.

(m) 8 *Term Rep.* 578. See also *Cart* 215.

been included in the damages; though it cannot be worth the defendant's while to be at the expence of another trial to apportion the damages. But as to the other article furnished, namely, the livery, I cannot say that it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery. The general rule is clear, that infants are liable for necessaries according to their degree and station in life. This defendant was placed in a situation which required such an attendant. Therefore, however inclined I am in general to protect infants against improvident contracts, I think that this case falls within the fair liability which the law imposes on infants of being bound for necessaries, which is a relative term, according to their station in life."

In all cases it must appear that the articles furnished were actually necessary, and suitable to the infant's estate and condition, of which the court and jury will determine; (n) and the law, distinguishes between persons as to the fitness of necessaries; as, for instance, between a nobleman and a gentleman's son; so also, as to the time and place of education; as at *school, Oxford,* and the *inns* of court. (o)

An infant who lives with, and is properly maintained by her parent, cannot bind herself to a stranger for necessaries.

Thus, in the case of *Bainbridge v. Pickering*, (p) which was an action for feathered caps, and other ornamental apparel sold to the defendant, who at the time of the sale was an infant, and lived with her mother.

Gould Just. said, "If an infant lives with her parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of cloaths; or other real necessaries of life, I apprehend that the child cannot bind herself to a stranger even for what might otherwise be allowed as necessaries: for no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother. And as there is not here any pretence but that the child was decently provided for by the mother, I think we should give no

(n) *Bac. Abr. tit. Infancy and Age, I. 1. Com. Dig. tit. Infant, B. 5. Cro. Eliz. 583.*

(o) *Vide Cart. 215. (p) 2 Bl. Rep. 1325.*

"countenance to such persons as inveigle young women into extravagance under the pretext of furnishing them with necessaries, without the previous consent of the parent."

So, it is incumbent on a tradesman before he trusts an infant with what may appear to be necessaries, to enquire whether he is provided by his parents or friends.

Thus, in the case of *Ford v. Fothergill* (q) which was an action of *assumpsit* for work and labour as a tailor. The facts were these; the defendant, being under age, came to the house of the plaintiff, in company with a gentleman who was previously a customer of his, and ordered a coat, waistcoat, and two pair of breeches, which were to be sent to the *Grecian Coffee-house*, and were accordingly sent there.

The defendant proved, that at this time he was provided by his father with all things necessary for his support. He had been very extravagant, and his father had, in the course of the year 1793, when this debt was contracted, paid many other debts contracted with other tailors to a large amount.

Lord *Kenyon* Ch. J. said, "Nothing is clearer in the law than that an infant cannot contract a debt except for necessaries. It is absolutely necessary that he should have the power of making that contract, otherwise he would starve. As to the plaintiff not knowing his fortune it is no excuse; it was incumbent on him to enquire into that, and to prove it to the jury. Whether he was living with his father or not, the person who dealt with him was bound to enquire and know who he was. He was living at a coffee-house, itself no mark of a wary disposition; the plaintiff should have enquired there, and gone to his father and enquired of him whether he was in want of these cloaths. Circumstanced as this case is, such an enquiry ought to have been made."

If an infant comes to a stranger, who instructs him in learning, and boards him, there is an implied contract in law, that the party shall be paid as much as his board and schooling are worth; but if the infant, at the time of his going there, was under the age of discretion or if he were placed there by a guardian, or friend, who agreed to pay for his board and education, the party that

(q) *Paley's Cas. N. P.* 229. 1 *Esq. Rep.* 211. *S. C.*

boarded him has no remedy against the infant, but must resort to the person with whom he agreed. (r)

It is also said, (s) "that it hath, of late years, been several times determined, that where a parent or relation, &c. places an infant at a boarding school, the credit being given to such parent, relation, &c. the master cannot have any remedy against the infant."

A fine due by an infant on an admittance to a copyhold estate, is recoverable against him during his minority.

Thus, in the case of *Evelyn, bart. v. Chichester*, (t) where it appeared that a copyhold estate devolved on the defendant when he was an infant of six years of age: a fine was assessed, and he was admitted to the estate on his coming of age. *Assumpsit* was brought for this fine; and, upon a case reserved for the opinion of the Court of *King's Bench*, the question was, whether *assumpsit* would lie for the fine, which the jury found to be a reasonable one. The court held clearly, that the action lay: and *per Yates Just.* "If the defendant was still an infant, I should think this action maintainable. Debt, perhaps, would not lie, because an infant cannot wage his law; but *assumpsit*, I think, would lie, as the infant continued to occupy and enjoy the estate." In 2 Bulstr. 69. *Kirton v. Elliott*, the plaintiff recovered against an infant the rent upon a lease made to him: and it is there said, "if a lease be made to an infant, and he occupies and enjoys, he shall be charged with the rent."

An infant may contract for necessaries. He could not have received the rents and profits of this copyhold without admittance; and he must previously pay the fine for such admittance. But here, he has affirmed the whole transaction: he has enjoyed two years since he came of age."

If an infant contracts for necessaries, and enters into a single bill, bill of exchange, or promissory note, he shall be bound by such obligation. (u)

So, if money be actually laid out and expended in the purchase of necessaries for an infant, he shall be liable for the amount so laid out. (v)

(r) *Duncomb v. Tickridge*, *Allen* 94.

(s) 3 *Bac. Abr.* 395. in marg. last edit. by Gwillim.

(t) 3 *Bur.* 1717. *Bul. N. P.* 154.

(u) 1 *Roll. Abr.* 729. l. 20. *Cre. El.* 920. 1 *Lev.* 86. *Co. Lit.* 172. a *Carth.* 160. 2 *H. Bl.* 514.

(v) 5 *Mod.* 368. 10 *Mod.* 67. 12 *Mod.* 197.

So, money paid for an infant to procure his liberation from an arrest for a debt contracted for necessaries, may be recovered against him by action at law.

Thus, in the case of *Clarke v. Leslie*, (w) which was an action of *assumpsit*, and the several counts in the declaration were for meat, drink, and other necessaries, found and provided for the defendant; money lent and paid to the defendant's use, with the other common money counts.

Part of the demand claimed arose in this way; the defendant had been arrested by a writ out of the *Marshalsea Court*, for 7*l.* 2*s.* 6*d.*, and was in custody of the officer. The plaintiff was sent for, and paid that debt to the officer; in consequence of which the defendant was discharged out of custody.

The defence to the action was infancy; and it was objected by the defendant's counsel, that this sum so stated to be paid by the plaintiff to the officer, could not be recovered against an infant: that it could be recoverable only as money lent and advanced by the plaintiff to the defendant, or as paid to her use; and in either of which cases an infant was not liable; for to entitle the party to recover the demand, it must be for necessaries, or money advanced and directly applied in the payment for necessaries.

It was answered, that the money paid by the plaintiff to procure the defendant's discharge, was to be deemed necessaries: that the legal meaning of necessaries was not confined to mere meat, drink, education, or articles of that description: that that which procured the defendant her liberty, which enabled the defendant to earn her bread, came equally under the description of necessaries; and as such was recoverable.

Lord Alvanley, Ch. J. said, "I agree that the demand in question may come under the description of necessaries. If the defendant had been taken into custody for a debt contracted for necessaries, discharging that demand would be to pay for necessaries; so if the defendant had been in execution; that is, if at all events the defendant had made herself liable to the debt, and could not controvert it, paying that debt, I think, would be necessaries. This is my opinion; and it was the opinion of other judges of great learning: but, I think, that the plaintiff must show that the debt, which was so paid here, was either for neces-

(w) 5 *E/p. Rep.* 28.

aries, or that the party was in execution. If this was not to be required, an arrest for a supposed or fraudulent debt might be made, and the infant might be subjected to the payment of the money advanced to liberate her from an arrest, for a demand for which an infant could not legally be made liable. If therefore the plaintiff can prove, that the money paid at the spunging-house was paid to extricate her from imprisonment for a lawful debt, for which she was liable, and might have gone to jail, or if she was then in execution, I think the money paid may be recovered, as being expended for the benefit of the infant; but if no evidence of that kind is given, as she may have been in custody on *mesne process* for a debt to which she, as an infant, was not liable: as she may have been arrested fraudulently by the very plaintiff, to cover the advance of money, I think the plaintiff cannot recover. I go farther; for even if this debt in the spunging-house were to be considered as for necessaries, I am not prepared to say, that if the plaintiff had paid the debt for the infant, in order to enable her to return to a state of prostitution, as has been suggested, so that the debt thereby created must be discharged by the wages of prostitution, the plaintiff would, in that case, be entitled to recover; for the transactions would be tainted by the same immoral consideration."

But though an infant may bind himself in a *single bill* for necessaries, yet if he enter into an obligation, and a *penalty* be annexed to it, such obligation is void. }

Thus, in the case of *Ayliff v. Archdale*. (u) The case upon demurrer was, the plaintiff had paid certain money for the necessary meat and drink of the defendant, being an infant, and took an *obligation in the double sum* for the payment thereof; and whether this were good or voidable? was the question. The whole court held it to be void; but if the plaintiff had taken an obligation of the very sum which he laid out for his necessary maintenance, it had been otherwise.

If, however, an infant and a surety enter into an obligation with a penalty for necessaries found for the former, the bond will bind the surety, although it will not bind the infant.

It is also said, (y) that if an infant becomes indebted for necessaries, and enters into a bond with a penalty for the amount, this

(u) Cro. El. 920. See also Co. Lit. 172. a. Mo. 679. Godb. 219.

2 H. Bl. 514.

(y) Bac. Abr. tit. Infancy and Age. I. 1.

*Written with
a single obligation*
3 Feb. 1798.
13 H. R. 155.

shall not drown the simple contract, because the bond has no force.

If one lends money to an infant, who actually lays it out for necessaries, yet this shall not bind the infant, nor subject him to an action; for it is upon the lending that the contract must arise; and the law will not intrust an infant with the application and laying out of money: and the infant's applying it afterwards for necessaries will not, by matter *en post facto*, entitle the plaintiff to an action. (z)

So, an *infirmul computasset*, or account stated, lies not against an infant, though the particulars of the account be for necessaries; for the law considers an infant as not having sufficient discretion to agree to an account, and the *assumpsit* is upon the account. (a)

Of Contracts made with Infants out of England.

If an action be brought against an infant upon a contract made with him in *Scotland*, to which infancy is pleaded, or given in evidence, under the general issue, the defendant, at the trial, must be prepared to prove, what the law of that country is in regard to infants; otherwise he will be liable.

Thus, in the case of *Male v. Roberts*, (b) which was an action of *assumpsit* for money paid, laid out, and expended to the use of the defendant, money lent and advanced, to which the defendant pleaded the general issue of *non assumpsit*.

The case, as opened by the plaintiff's counsel, was, that the plaintiff and the defendant were performers at the *Royal Circus*: while the company were performing at *Edinburgh*, in *Scotland*, the defendant had become indebted to one *Cockburn* for liquors of different sorts, with which *Cockburn* had furnished him; not having discharged the debt, and it being suspected that the defendant was about to leave *Scotland*, *Cockburn* arrested him, by what is there termed a writ of *Fugé*: the object of which is to prevent the debtor from absconding.

(z) Vide 1 *Salk.* 279. 387. 5 *Mod.* 368. 10 *Mod.* 67. *Bul. N. P.* 154.

(a) *Trueman v. Hurst*, 1 *Term Rep.* 40. (b) 3 *Esp. Rep.* 163.

The defendant being then unable to pay the money, the plaintiff paid it for him; and he was liberated. The present action was brought to recover the money so paid, as money paid to his use.

The defence relied upon was, that the defendant was an infant when the money was so advanced.

Lord Eldon, Ch. J. said: "It appears from the evidence in this cause, that the cause of action arose in *Scotland*; the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence, by the law of *Scotland*, had the action been commenced there?"

For the defendant it was contended, that the contract was to be governed by the laws of *England*; in which case the plaintiff could recover for necessaries only. That at all events it should not be presumed that the laws were different; and as it appeared that the debt did not accrue for necessaries, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

Lord Eldon said: "What the law of *Scotland* is with respect to the right of recovering against an infant for necessaries, I cannot say; but if the law of *Scotland* is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence; and I hold myself not warranted in saying that such a contract is void by the law of *Scotland*, because it is void by the law of *England*. The law of the country where the contract arose must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence."

*Of Contracts with Infants, ratified and confirmed
by them when at full Age.*

The privilege the law allows to infants being entirely calculated for their benefit, and to prevent frauds being practised upon them during their *minority*; hence at their full age, they are at liberty either to ratify and confirm their contracts, or to avoid them. Therefore, if an infant be furnished with *goods*, which do not come within the description of *necessaries*, and after he comes of age, he
ratifies

ratifies the contract by a promise to pay, he is bound by such promise, and liable to be sued thereon for the debt. (c)

So, if an infant give a bond, and at full age promise payment, it shall bind him. (d)

So, if a man enters into an obligation for payment of money for an infant, and the infant, after he comes of age, promises, in consideration that the obligee had entered into the bond and paid the money, he would pay him the debt; this promise is valid and sufficient to support an action. (e)

So, where an infant borrowed money, and afterwards at full age promised payment; this is a good consideration for the promise, and he shall be charged. (f)

But to bind a person to the payment of a debt contracted during his infancy by a new promise, made by him at full age, it must be an absolute unequivocal promise to pay.

Thus, in the case of *Thrupp v. Fielder*, (g) which was an action of *assumpsit* for goods sold and delivered, to which the defendant pleaded that he was an infant at the time of the sale: The plaintiff replied a new promise made by the defendant after he came of full age.

In support of this replication, upon which issue was joined, the plaintiff could prove no express promise whatever to pay, but gave in evidence a payment of 40*l.* made by the defendant on account of the debt, since his coming of age.

For the plaintiff, it was contended, that this payment being made generally on account of the debt, was an admission by the defendant of his liability to pay, and tantamount to a new promise.

Lord *Kenyon*, Ch. J. said: "I am of opinion this is not such a promise as satisfies the issue. The case of infancy differs from the statute of limitations: in the latter case a bare acknowledgment has been held to be sufficient. In the case of an infant I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay, made by the infant after he has attained that age when the law presumes that he has discretion. Payment of money made, as in the present case, is no such promise."

(c) *Southerton v. Witlock*, 2 *Stra.* 690. *Borthwick v. Carruthers*, 1 *Term Rep.* 648.

(d) *Cro. El.* 127. 700. *Dy.* 272. *a. in marg.* 1 *Roll. Abr.* 18. l. 50.

(e) *Edmond's Case*, 3 *Leon.* 164. 4 *Leon.* 5. (f) *Comb.* 381.

(g) 2 *Essex Rep.* 628.

Such a promise must also be made *voluntarily*, and given with knowledge that the party was discharged by his non-age.

Thus, in the case of *Harmer v. Killing*, (b) the facts were these: the defendant had been furnished with goods during his infancy; and after he came of age, the plaintiff came to him to demand the money. The person sent saw the defendant, and threatened to arrest him: upon which the defendant agreed to give his note for it. But happening to mention to a friend of his what he was about to do, his friend said, don't do it: draw upon your father's executors. He then refused to do any thing.

It was contended, that this was not such a promise as was sufficient in law to bind the defendant.

Lord *Alvanley*, Ch. J. said: "That the infant was discharged by his non-age for goods, not necessaries, if furnished to him before his full age; but that he might bind himself by a new promise, after he obtained his full age: but that he held that such promise must be voluntary, and given with knowledge that he then stood discharged by law: that where an infant, under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection which the law afforded him, he should hold that he was not bound to it. If therefore the jury should be of opinion that the facts were, that this promise was so obtained, he should direct them to find for the defendant." A verdict was found for the defendant.

So, if a promise ^{be} made by an infant ^{confirmed} after he comes of age, to pay a debt contracted during his minority, ^{when he is able} the ability of the party to pay must be proved: but it is sufficient to show his ostensible appearance, and his circumstances as they are open to the observation of the world.

Thus, in the case of *Cole*, executor of *Cole v. Saxby*, (i) which was also an action of *assumpsit* for money paid, &c. And it was proved, that in a conversation with the defendant respecting the debt, which was contracted during his infancy, the defendant said, "he had had very heavy losses in trade; but that he would pay his part when he was able."

(b) 5 *Esq. Rep.* 102. Vide *Cro. El.* 700. *S. P.*

(i) 3 *Esq. Rep.* 159.

Lord *Kenyon*, Ch. J. said: "This is not an absolute promise to pay; it is, "when he is able." I remember a case before Lord *Mansfield*, in *Staffordshire*, in which he was of opinion, that it was incumbent on the plaintiff to show that the defendant was of ability to pay at the time of the action brought."

The plaintiff's counsel then called a witness to prove to that effect. The defendant's counsel cross-examined him as to his particular knowledge of the defendant's circumstances; whether he knew the state of his debts, or how he was circumstanced.

Lord *Kenyon*, Ch. J. said: "It was not necessary to inquire further than his ostensible appearance, and his circumstances, as they were open to the observation of the world; that if appearances were that he was of sufficient substance and ability, he should hold it sufficient to satisfy the promise."

The plaintiff did accordingly produce such evidence, which satisfied his lordship, who held it to be sufficient.

Of a Joint Contract made with an Infant and an Adult.

If a contract is made by an infant and an adult, they cannot both be sued thereon, but the action should be brought against the adult only, as being the sole contracting party in point of law.

Thus, in the case of *Chandler v. Parkes and Danks*, (*1*) which was an action of *assumpsit*, for work and labour, and materials found for both defendants. *Parkes* one of the defendants pleaded the general issue of *non assumpsit*; the other defendant pleaded infancy. The plaintiff entered a *noli prosequi* as to the defendant *Danks*, and proceeded to issue with the other defendant *Parkes*.

Lord *Kenyon*, C. J. on the case being opened, and looking into the record, said, "he doubted how the plaintiff could recover against one defendant only, in an action on a contract which he by his declaration, had stated to be a joint one against two: that the infancy being admitted, the plaintiff ought to have discontinued, and commenced a new action against the adult defendant, as being the sole contracting party according to the legal effect of such a contract, which was void against the infant."

(*1*) 3 *Esp. Rep.* 76. And see *Jaffray v. Frebain and others*, 5 *Esp. Rep.* 47. S. P.

The plaintiff's counsel contended, that the promise of an infant was not void, but voidable only; and if the plaintiff had declared against the adult defendant only, he could have pleaded in abatement, that the contract was a joint one; and quashed the plaintiff's writ.

Lord *Kenyon* said, "he continued of the same opinion; for the plea in abatement could not prevail, when it was disclosed that the other defendant was an infant."

*Of Contracts made with an Infant living apart
from his Father, &c.*

Where a father, living in the country, gives his son, residing in *London*, a reasonable allowance for his expences; the son is solely liable for necessaries; and the father shall be wholly discharged from such liability.

Thus, in the case of *Crantz v. Gill*, (1) which was an action of *assumpsit* brought to recover a sum of money for clothes furnished by the plaintiff, who was a taylor, to the defendant's son, an infant. The plaintiff proved that the clothes were furnished to the young man, and that the prices were reasonable.

The case in evidence on the part of the defendant was, that the father (the defendant) resided in *Cumberland*, and had sent his son up to *London* to be employed in the business of a haberdasher. That he had sent him to the care of a Mr. *Atkinson*, with instructions to him to pay a proper sum for providing the young man with necessaries suitable to his situation.

Mr. *Atkinson* was called, and he proved the above circumstances, and that he had in fact paid the son an allowance while he was in *London*, by his father's directions; that he had ordered clothes for him, but never pledged the father's credit in any respect.

Per Lord Kenyon. "The goods being furnished to the son, he is himself *prima facie* liable, they being necessaries; if tradesmen deal with him and he undertakes to pay them, they must resort to him for payment: the father it is true may be liable for necessaries

(1) 2 *Esp. Rep.* 471.

furnished to his son on his credit; but when he gives his son an allowance, that is in lieu of all charges, and the father cannot be bound by law to pay even for necessaries furnished to the son under those circumstances. It would be a great hardship on the father who would so be obliged twice to pay for necessaries furnished to his son."

So, in the case of *Simpson v. Robertson*, (m) which was an action for goods sold and delivered. Part of the demand was, for clothes furnished to the son of the defendant, by the plaintiff, who was a taylor.

Lord Kenyon, Ch. J. said, "he had ruled before, that if a tradesman colludes with a young man, and furnishes him with clothes to an extravagant degree, that though the father might have been liable, had they been to a reasonable extent, that the tradesman who gives credit to such an extravagant degree, shall not at law be allowed to recover."

*Of the Liability of a Father for Necessaries
furnished to his Son-in-law.*

A man is not bound in law to provide necessaries for his wife's child by a former husband.

Thus, in the case of *Tubb and others, v. Harrison and another*, (n) which was an action of covenant, in which the defendants, who were father and son, [after reciting that differences had arisen between the son and his wife, and that they had agreed to live separate, covenanted to the plaintiffs to pay the wife an annuity of 50l. a year, and to pay all the debts contracted by her which her husband was by law liable to pay. The breaches assigned were (amongst others) that the wife had then contracted a debt of 56l. 16s. 9d. to J. Brighton, for necessary board and lodging, and other necessaries, and for money paid and laid out for necessaries for Mrs. Harrison, and one John Perrin, her infant son by a former husband, at her request. On the trial of this cause, before Lord Kenyon, Ch. J. it was agreed that the plaintiffs should take a verdict for 150l.; and that it should be referred to an arbitrator to take an account of the particu-

(m) 1 Esp. Rep. 17. (n) 4 Term Rep. 118.

lars of the several demands, so that the same might be stated to the court of *King's Bench*, subject to their opinion and direction on the construction of the covenant in the deed of separation, whereon the action was brought, and whereby the defendants covenanted to pay all the debts contracted by *Sarah Harrison*, the wife, which her husband was by law liable to pay. The account being now delivered in, it appeared that several of the items were for the maintenance of her infant son by a former husband.

This matter was shortly spoken to at the bar; and the case of *Ren v. Munday*, reported by the name of *Munden* in 1 *Str.* 190. was relied on; where it was held, that a husband was not bound to maintain his wife's mother. But it not appearing from the statement of that case, either in *Strange* or in *Burn*, whether or not the wife were alive at the time, the court took time to consider of the point; and on a subsequent day,

Lord *Kenyon* said, "that he had seen a copy of the order in *Ren v. Munday*, taken from the records of the Court, by which it clearly appeared that the wife was alive when the order was made. The Court in that case reversed the order of maintenance, on the ground that the statute of *Elizabeth* only extends to natural relations. Therefore, on the authority of that case, we are of opinion that the husband is not liable for the expences of maintaining the wife's child by the former husband; and consequently that those articles in the account must be disallowed."

But though a man is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house, and they become part of his family, he shall be deemed to stand *loco parentis*, and be liable to a contract made by his wife for their education, &c.

Thus, in the case of *Stone v. Carr*, (o) which was an action of *assumpsit*, brought by the plaintiff, who was a schoolmaster, for the education and maintenance of an infant child.

The child was the son of the defendant's wife by a former husband. On the defendant's marriage with the child's mother, he had taken possession of an house which she occupied with her children, and which house had belonged to the first husband, the hus-

(o) 3 *Esp. Rep.* 1.

nels she had carried on was continued, and the children were suffered to live with him as part of the family, and provided for by him while he was at home.

For the defendant it was given in evidence, that he was gunner of an India ship; that during his absence on a voyage, the boy had been put out to school by his mother, to the plaintiff. His counsel then contended, that as he had never made any contract or agreement with the plaintiff, he could not be charged, by reason of any implied liability; and cited the case of *Tubb v. Harrison*. (p)

Lord Kenyon, Ch. J., after referring to the case cited, said, "the present was distinguishable from that: there was no doubt, if a man married a woman having children by a former husband, he might refuse to provide for them; and, under the authority of the *King v. Munday*, cited in the case of *Tubb v. Harrison*, he could not be compelled to do it; but if a man did not so refuse to entertain them, and took the children into his family, he then stood *loco parentis* as to them. Such was the case here: he had so adopted them, and having gone abroad, and left them in the care of his wife, he should hold him to be bound by her contracts made for their maintenance and education. If she had any property by her first husband, the case was stronger; for then part of the property, of which the defendant possessed himself, belonged to the children: but even had their father died insolvent, it would not alter his opinion. The defendant, on his marriage, had no right to take possession of the house and business: he had thereby confounded all the boundaries of the property, and placed himself in a state of responsibility." He therefore directed the jury to find a verdict for the plaintiff; which they accordingly did.

*Of Contracts made with a Son, an Adult, carrying
on the Business of his Father, &c.*

Where a son ostensibly appeared as the proprietor and conductor of a business in a trade, not an extensive one, and the father, to whom the business really belonged, was superannuated and incapable of conducting it, it was determined that the son was liable on contracts connected with the business.

Thus, in the case of *Turrel v. Collett*, (q) which was an action of *assumpsit* to recover the value of a quantity of timber alleged to have been sold to the defendant, who was a carpenter.

(p) *Ante* 167.

(q) 1 *Esq. Rep.* 320.

The defence set up was, that the timber was furnished to his father, and on his credit only ; he being in the same line of business, and conducting it only for his father.

This defence was met by evidence on the part of the plaintiff, showing, that the father was a man very far advanced in years, without memory or understanding ; and it was admitted that the son (the defendant) managed the business ostensibly.

Lord *Kenyon*, Ch. J. said, " that under the circumstances proved, the defence set up was inadmissible. In great concerns, where there were many partners, as in the case of great breweries, for example, notwithstanding the old age, infirmity, or insanity of one of the partners, the business might still be carried on for the benefit of the family ; but in little businesses or concerns, such as the present, if the owner became devoid of memory or understanding, the business must necessarily be at an end. Here the defendant was the ostensible person who conducted the business, and with whom the contract was made : the plaintiff therefore had a right to apply to him ; nor should he be allowed to turn the plaintiff round, by setting up the credit as given to one whose intellectual derangement incapacitated him from conducting the most trifling concerns of life."

CHAPTER II.

Of Contracts with Married Women.

THE subject of the present chapter will be considered in the following order:

1. *Of Contracts made by a Married Woman with and without the Assent of her Husband.*
2. *Of Contracts with a Married Woman during the Banishment, &c. of her Husband.*
3. *Of Contracts with a Feme Covert sole Trader, &c.*
4. *Of Contracts with the Wife before Marriage.*
5. *Of Contracts for Necessaries provided for a Married Woman.*
6. *Of Contracts made by a Woman living with a Man as his Wife.*
7. *In what Cases Husband and Wife ought to sue and be sued jointly.*
8. *In what Cases the Husband may sue alone, or join his Wife; and when the Husband must sue alone.*

1. Of Contracts made by a married Woman, with and without the Assent of her Husband.

A married woman has no power to make a contract without the assent of her husband precedent or subsequent, express or implied: therefore if she enters into any contract without such assent, it is absolutely void. (a)

So, if the wife sell or dispose of the goods of her husband, without his assent, the sale is void; and the husband may recover them back by action of trover. (b)

So, where the wife buys goods without the consent of her husband, he is not chargeable for them. (c)

Marshall v. Sutton P.R. 545 So a note or bill drawn, or indorsed by a married woman, is void.

Thus, in the case of *Connor v. Martin*, (d) which was an action brought by the indorsee of a promissory note, payable to *Susan Connor*, or her order, and given to her before marriage; which note, after her marriage and while *covert*, she indorsed to the plaintiff: the defendant pleaded that *Susan Connor* was married at the time of the making the indorsement: the plaintiff demurred; and the question upon argument was, whether the plaintiff could maintain the action upon a note indorsed by a *feme covert*? The whole Court were of opinion, that the *feme covert* could not assign the note, because by act of law it became the sole right and property of her husband.

So, in the case of *Barlow v. Bishop*, (e) which was also an action by the indorsee of a promissory note against the maker, which note was drawn payable to one *Ann Parry* or order, at two months after date, for 41*l.* 10*s.*, and by her indorsed to the plaintiff. The first count of the declaration was upon the note, to which were added the common money counts. At the trial, before Lord *Kenyon*, Ch. J. it appeared in evidence, that *Ann Parry* was a married woman, carrying on trade at *Birmingham* in her own name, with the consent of her husband; and that the plaintiff, who lived in *London*, had furnished her with goods to the

(a) Ruled by all the Judges in the case of *Manby v. Scott*, 1 Sid. 120. 1 Lev. 4. 1 Mod. 128.

(b) Com. Dig. tit. Baron and Feme. (c) 4 Leon. 42.

(d) Cited in 3 Wils. 5. See also 1 Stra 516 S. C.

(e) 1 East Rep. 432. 3 Esp. Rep. 266. S. C.

amount of the note, dealing with her as a *feme sole*; that the plaintiff, after much delay, having pressed for payment, the defendant, with a view to serve Mrs. *Parry*, gave her the note in question, with knowledge of her being married, and with a view that she should pay it over to the plaintiff, in order to stop his proceeding against her, which she did by indorsing it over to him. A verdict was taken for the plaintiff, with leave to the defendant to move the court to enter a nonsuit, if they should be of opinion that the plaintiff could not recover upon any of the counts.

The Court of *King's Bench* were of opinion, that the indorsement was void, and that the plaintiff could not recover upon any of the counts.

Lord *Kenyon*, Ch. J. said, "I saved the point at the trial, not from any doubt entertained by myself at the time, but to give an opportunity to the plaintiff's counsel to see if there were any ground upon which the action could be sustained; but none has been or can be stated. It is clear, that the delivery of the note to the wife vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, I am not prepared to say that that would not have availed; as many acts of this nature may be done by a power of attorney; and the jury might have presumed what was necessary in favour of an authority from her husband for this purpose. But the indorsement being in her own name, it is quite impossible to say that she could pass away the interest of her husband by it. And this is not like a note payable to the order of a fictitious person, to whom no interest can pass; but here the interest passed to the husband. Neither is there any colour for saying that the plaintiff can recover upon the money counts. No money passed between these parties."

So, the executor of a *feme covert*, who lived apart from her husband, and traded as a *feme sole*, is not liable to be sued at law for debts contracted by the wife during her coverture, whilst living in a state of separation.

Thus, in the case of *Clayton v. Adams*, (f) executor of *Mary Byrne*, which was an action of *assumpsit* against the defendant, as executor of *Mary Byrne*, for goods sold and delivered to her. Plea, that *Mary Byrne*, at the time of making the supposed pro-

(f) 6 Term Rep. 604. Vide Post, *tit.* Contracts by a Feme Covert, sole Trader.

misses, was *covert* of one *Arthur Byrne*. Replication that *Mary Byrne*, at the time of making the said promises, and from thence until her death, lived separate and apart from the said *Arthur*, and carried on the trade and business of an haberdasher as a *feme sole*, and that the plaintiff never knew of or trusted the said *Arthur*, but dealt with the said *Mary* as a *feme sole*, and on her credit; and in the course of such dealings for goods sold by him (the plaintiff) to her as such *feme sole*, she made the said promises, &c.; that after the death of the said *Mary*, the defendant, as her executor, took and possessed divers goods and chattels, which were of and in possession of the said *Mary* as such *feme sole*, to the amount of more than the damages sustained by the plaintiff by reason of the non-performance of the said promises, &c., and whereout as such executor he ought to have satisfied the same, &c. To this replication the defendant demurred, and the plaintiff joined in demurrer. And, upon argument, the counsel for the plaintiff cited the cases of *Norton v. Turvill* (g) and *Hulme v. Tenant*, (h) in which it had been holden in the Court of Chancery that the separate estate of a *feme covert* was liable for the discharge of her bond debt.

But the Court in this case gave judgment for the defendant; and Lord Kenyon, Ch. J. said, "To the equity cases that have been cited I fully subscribe: but they cannot govern us in a court of law. A court of equity can mould interests differently from a court of law; and can give relief in cases where a court of law cannot. In order to enable the plaintiff to recover in this action, he should have shown that the *feme covert*, when alive, might have been sued, and that the defendant was possessed of that property in respect of which she was liable: but it does not appear that this could have been the separate property of the wife. And the probate of the will of the wife was absolutely void: We cannot determine that an action might have been maintained against this *feme covert*, without also saying that she might have been taken in execution: but that would operate as a divorce between the husband and wife."

In some modern cases (i) it has been decided that a married woman living apart from her husband, and having a separate maintenance secured to her by deed, may contract and be sued as a *feme sole*,

(g) 2 P. Wms. 144. (h) 1 Bro. Ch. Cas. 16.

(i) *Corbett v. Poelnitz and Wife*, 1 Term Rep. 5. Et vide the several cases there cited.

and that her second husband is liable for debts contracted in the life time of her former husband, during the state of separation.

But in the more recent case of *Marshall v. Rutton*, (k) these decisions were reviewed and considered; and, after several arguments at the bar, it was solemnly determined by all the judges, that a *feme covert* cannot contract and be sued as a *feme sole*, even though she be living apart from her husband, having a separate maintenance secured to her by deed.

Lord *Kenyon* delivered the judgment of the Court in this case as follows: "This is an action of *assumpsit* brought by *John Marshall* against *Mary Rutton*, for goods sold and delivered to her, for work and labour, and money laid out to her use, and on other general counts. To this the defendant has pleaded her coverture with one *Isaac Rutton*, who is still alive. The plaintiff has replied, that before the making of the promises of the defendant, she and her husband had mutually covenanted and agreed to live separate and apart; that a separation accordingly took place between them, and that they have continually from thenceforth lived, and still live, separate and apart; that a competent separate maintenance, suitable to the estate and degree of the defendant, of 200*l.* *per annum*, was, in due form of law, secured to her by deed during the joint lives of her and her husband, which has been duly paid to her; and that the promises in the declaration were made subsequent to the separation of her and her husband. The defendant has rejoined, admitting the separation between the defendant and her husband before the promises, &c. and stating the deed mentioned in the replication as being a deed of articles of agreement made between the said *Isaac Rutton* and herself, of the one part, and *Thomas Rutton* of the other part, whereby it was provided that the separate maintenance should be paid for such time only as the defendant should suffer the said *Isaac Rutton* to live separate and apart from her, and the defendant should maintain a chaste, due, and becoming conduct, and should support and keep *Mary Rutton* and *Elizabeth Rutton*, their two youngest children, without any other charge or incumbrance to the said *Isaac Rutton*, &c., concluding with a traverse of the said separate maintenance being secured to her during the joint lives of her and her husband. To this rejoinder the plaintiff, having craved oyer of the articles of agreement, has *demurred*, assigning various causes

(k) 8 Term Rep. 545. See also *Hatchet and another v. Baddeley*, 2 Bl. Rep. 1079. *et post*.

which

which need not be stated; and the defendant has joined in demurrer.

The general question which arises on this record, is, whether by any agreement between a man and his wife she may be made legally responsible for the contracts she may enter into, and be liable to the actions of those who may have trusted to her engagements, as if she were sole and unmarried. On account of the magnitude of the question, and from respect to the authority and learning of those judges, who in some late cases have holden that a *feme covert* living so separate from her husband, is liable to be thus sued, we thought this a case fit to be argued before all the judges; and it has been twice argued, once in *Easter Term* 1798, before all the then Judges, except Mr. *Baron Perryn*, and again in this term (1) before all the present Judges, except Mr. Justice *Buller*, whose absence on every account we had occasion to lament. And, after a very full consideration, the opinion of all the Judges, who heard the last argument, is, that this action cannot be supported.

The ground on which the plaintiff in this case rests his claim, is an agreement between the defendant and her husband to live separate and apart from each other. That is a contract supposed to be made between two parties, who, according to the text of *Littleton*, s. 168. being in law but one person, are on that account unable to contract with each other; and if the foundation fail, the consequence is, that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law, in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married; and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out; and it was asked, whether after such an agreement as this the temporal courts could prohibit, if either party were to sue in the *Ecclesiastical Court* for

(1) *Easter Term*, 1800.

the restitution of conjugal rights? whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction? whether they could be witnesses for and against each other? whether they could sue and take each other in execution? And many other questions will occur to every one, to which it will be impossible to give a satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage, while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition? or how any power short of that of the legislature can change that which, by the common law of the land, is established as the course of judicial proceedings.

The argument in favour of the plaintiff rested on this position only, as a principle, viz. that where the husband ceases to be the protector of his wife, and is not liable to have any claim made on him for her support and maintenance, it necessarily follows that she herself must be her own protectress, make contracts for herself, and be responsible for them. But if this were a necessary consequence, it would hold in all cases: but that is not so; for if a woman should elope from her husband, withdraw herself from his protection, and live in adultery, he is not by law liable to answer for her necessaries; and no case has decided that the woman is. A wife living apart from her husband, and who has property secured to her separate use, must apply that property to her support, as her occasions may call for it; and if those who know her condition, instead of requiring immediate payment, give credit to her, they have no greater reason to complain of not being able to sue her, than others who have nothing to confide in but the honour of those they trust. From the incapacity of a married woman to contract or to possess personal property which may be the subject of contract, men and their wives, desirous of living separate, have found it necessary to have recourse to the intervention of trustees, in whom the property, of which it is intended she shall have the disposition, may vest uncontrolled by the rights of the husband, and with whom he may contract for her benefit; but in such property the woman herself acquires no legal interest whatsoever. Of such trusts Courts of *Equity* alone can take notice; they can cause the fund to be brought before them to be applied as in justice it ought to be; and in those courts the creditor must prefer his claim.

The earliest cases on this subject proceed on the ground of the husband being considered as dead, and the woman as being in a state of widowhood, or as divorced à *vinculo matrimonii*, in which light *Rutton* and his wife do not stand. And until the cases of *Ringstead v. Lady Langborough*, *Barwell v. Brooks*, (m) and some subsequent cases, which we wished to have re-considered, we find no authority in the books to show that a man and his wife can by agreement between themselves change their legal capacities and characters; or that a woman may be sued as a *feme sole* while the relation of marriage subsists, and she and her husband are living in this kingdom.

For these reasons our opinion, in conformity with that of all the Judges who heard the last argument, is, "that there must be judgment for the defendant."

But a contract made by a married woman with the assent of her husband, is good; and shall be taken as the contract of the husband. (n)

So, where a wife traded by her husband's consent, and gave bills for money, and he received the profits. The wife borrowed 100*l.* and died, and a bill was brought against the husband for the money. An issue was directed to try, whether the money was borrowed for carrying on the trade; for if it were, the husband should be decreed to pay it. (o)

So, if the wife of *A.* receives 10*l.* to the use of *B.* and this comes to the profit of *A.* in a convenient and necessary way, though it was without *A.*'s order or consent after, yet *A.* is liable to this debt, and the count or declaration shall be of a receipt by the hands of the baron. (p)

So, if a *feme covert*, without any express authority from her husband, contract with a servant by deed, the servant, having performed the service stipulated, may maintain *assumpsit* against the husband. (q)

So, where a husband permits his wife to act for him in any department or business, her contracts and acknowledgements shall bind the husband.

(m) Cited in the case of *Corbett v. Poelnitz*, 1 *Term Rep.* 6.

(n) 4 *Vin. Abr. tit. Baron and Feme. E. a. pl. 20. 3 Bull. 90. 1 Stra. 80. See also Barlow v. Bishop*, per *Ld. Kenyon*, ante 173.

(o) 2 *Freem. Rep.* 215. pl. 288.

(p) *Jenk. 4. pl. 5.* (q) *White v. Cuyler*, 6 *Term Rep.* 176.

Thus,

Thus, in the case of *Emerson v. Blonden*, (r) which was an action of *assumpsit* for the use and occupation of certain rooms in the plaintiff's house, which had been let to the defendant.

The defendant and his wife had taken the apartments at a certain rent, the wife had made the bargain, and had agreed to give three months' notice of quitting. Having quitted without notice, the action was brought to recover the three months' rent.

A witness for the plaintiff proved a demand of the rent from the defendant's wife, and that she had acknowledged the sum claimed to be due, and had promised payment.

The counsel for the defendant objected to this evidence, as it was admitting the declarations of the wife, and her acknowledgment of debt to charge the husband.

It was answered by the plaintiff's counsel, that the defendant having, in the present instance, permitted his wife to act for him, in making the agreement, and settling the terms upon which the lodgings were taken, that he had thereby constituted her his agent for that purpose, and should therefore be bound by her acts and admissions.

Lord *Kenyon*, Ch. J. said, "that the rule of law had been correctly stated by the plaintiff's counsel, that where a wife acts for her husband in any business or department, by his authority and with his assent, that he thereby adopts her acts, and must be bound by any admission or acknowledgement made by her respecting that business, in which by his authority she has acted for him, and that therefore in the present case her admission of the debt due to the plaintiff on account of the lodging, was competent and admissible evidence to charge the husband."

2. *Of Contracts with a Feme Covert during the Banishment, &c. of her Husband.*

We have already seen that the contracts of a *feme covert* are in general void, unless made with the assent of the husband. But in the case of banishment, abjuration, or exile, the law considers the husband as civilly dead, and therefore permits the wife to contract, and sue or be sued as a *feme sole*; for it would be unreasonable

(r) 1 *Esp. Rep.* 142.

that she should be remediless on her part, and equally hard upon her creditors, who not having any remedy against the husband, should be without remedy against the *feme*. (s)

So, an action lies against a *feme covert*, though the banishment be only for a limited time.

Thus, in the case of *Sparrow v. Carruthers*, (t) which was an action upon a note of 10*l.* given by a married woman, who kept a public-house, for some malt. The defence relied on, was the defendant's coverture. But, upon the trial, the plaintiff proved that her husband had been transported, and his time was not expired. The question was, whether she was liable. Yates, Justice, thought that the court must consider the transportation as suspending her disability. A verdict was accordingly found for the plaintiff.

The principle of this rule of law has also been extended to cases where the husband has resided abroad, without any probability of returning to *England*, and where the wife has represented herself, and contracted as a *feme sole*.

Thus, in the case of *Derry v. The Dutchess of Mazarine*, (u) which was an action of *assumpsit*, brought against the defendant, for wages and money lent; the defendant pleaded coverture, and issue thereupon. And notwithstanding there was very strong evidence at the trial, that the Duke of *Mazarine*, the defendant's husband, was alive in *France*, the jury found for the plaintiff; because the *Dutchess* had lived in *England* for twenty years as a *feme sole*, and had contracted continually as such; and he, who was her husband, was an alien enemy. It was moved, on behalf of the *Dutchess*, that this verdict was against evidence and law, for a *feme covert* cannot be solely charged for debts and contracts, without divorce and alimony, although the husband be a foreigner. But by *Holt*, Ch. J. when the husband is an alien enemy, and under an absolute disability to come and live here, the law perhaps will make the wife of such an husband chargeable as a *feme sole* for her debts and contracts.

(s) *Bro. Abr. tit. Baron et Feme, pl. 66. Lady Belknap's case, 1 H. 4. 1. p. 12. 2 H. 4. f. 7. a. Co. Lit. 132. b. 133. a. 1 Rol Rep. 400. Mo. 85. 1 Bull. 140. 3 Bull. 188. Bac. Abr. tit. Baron & Feme, M.*

(t) *Coram Yates, Just. on the Northern Circuit, cited in 1 Term Rep. 6.*

(u) *1 Ld. Raym. 147. But see 2 Salk. 646. 2 Wils. 308; and 1 Bos. and Pul. 339; where the verdict in this case is considered as being clearly against law, and its equity only made the ground of refusal of the new trial. See vide the cases which follow.*

So, in *Walford v. The Dutchess De Piennes*,^(v) which was an action of *assumpsit* for goods sold and delivered. Plea of coverture. The evidence in support of this plea established the fact of marriage; and further, that the *Duke*, who was a foreigner, had gone abroad in the year 1793, and had not since returned; during that interval the *Dutchess* had kept house, and paid bills for goods furnished on her own account, and in her own name; but the witness who proved those facts said, that the *Duke*, on his going abroad, had proposed to remain abroad only for four months, and, as the witness believed, had not abandoned his intention of returning to this country, though he had not yet done so.

Upon this evidence Lord *Kenyon*, Ch. J. ruled, that the defendant was liable. His lordship said, "the present case came within the principle of the old common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the wife not liable; but here was a desertion of the kingdom, and an absence of some years; * he was no longer domiciled here, and in the interval his wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might be starved."

So, in *De Gaillon v. L'Aigle*,^(w) which was an action of *indebitatus assumpsit* for money paid, &c. The defendant pleaded coverture with *John Martin Harel L'Aigle*. The plaintiff replied, that before the making of the promises and undertakings in the said declaration mentioned, and from thence hitherto, the said *John Martin Harel L'Aigle* lived and resided in parts beyond the seas, out of this kingdom, to wit, at *Hamburg*; and that during all that time the said *Viétoire Harel L'Aigle* lived in this kingdom separate and apart from the said *John Martin Harel L'Aigle*, and followed and carried on the trade and business of a merchant, as a single woman, and a sole trader, to wit, at *Westminster*, &c.; that the plaintiff did not give any credit to the said *John Martin Harel L'Aigle*, but traded and dealt with the said *Viétoire Harel* as a *feme sole*, and on her sole credit; and that the said *Viétoire Harel* made the said several promises and undertakings in the said declaration mentioned, as such *feme sole* as aforesaid.

(v) 2 *Esq. Rep.* 554. and in another case against the same defendant at the suit of *Franks*. *Ibid.* 587. S. P.

* About three years. (w) 1 *Bos. and Pal.* 357.

To this there was a general *demurrer* and joinder. And in support of the *demurrer* were cited the cases of *Corbett v. Poelnitz*, (x) *Gilchrist v. Brown*, (y) and *Clayton v. Adams*. (z)

But the court held, that the defendant was personally liable, and accordingly gave judgment for the plaintiff.

Buller, Just. said, "There is another set of cases of a very different nature from those which have been relied on by the defendant; but which are much more applicable to this case. The first of these is the *Lady Belknap's* case: * now let us see if any sound distinction between that case and this can be maintained. The husband there was banished, but it is not stated whether he was banished for one year, or for five years, or for life: it was held sufficient that he was in banishment at the time when *Lady Belknap's* contract was made; and I can see but one principle on which the case could have been decided; viz. that the rights known to exist in law between husband and wife were not interfered with by allowing the wife to be taken in execution: as the husband was banished (though it be not stated whether for life or not,) the matrimonial rights during his banishment were at least suspended. In later times the cases have gone further. In *Sparrow v. Caruthers*, (a) it was shown, in answer to evidence of coverture, that the husband was transported for seven years only, and after that time was expired, he had a right to return, and demand the comfort of his wife, even if she were in gaol; yet the husband being abroad, and not capable of enjoying the matrimonial rights, it was held that the disability of the wife was suspended. In those cases the husband was sent out of the country for his crimes, whereas here the husband has voluntarily abandoned his wife, and, for any thing that appears, never was in *England*, and perhaps never may come here. The wife has traded as a *feme sole*, has obtained credit as such, and ought to be liable for her debts."

Heath, J. "I am of the same opinion. The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the *feme covert* that she should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of gaining her livelihood. The husband, perhaps, never was in *England*, and never may be, so that this case is not at all like those which proceeded on the ground of a separate maintenance."

(x) 1 Term Rep. 5. (y) 4 Term Rep. 766. (z) 6 Term Rep. 604.
* Ante 180. note 1. (a) Ibid.

But, in the case of *Farrer v. The Countess Dowager of Granard*, (b) which was an action of *indebitatus assumpsit* for the use and occupation of certain ready furnished lodgings. The defendant pleaded coverture; to which the plaintiff replied, that the defendant's husband lived and resided in *Ireland*, and that the defendant lived in *England*, as a single woman; and as such single woman, promised, &c. The court held the replication bad on general demurrer; the terms of it only amounting to a mere temporary absence.

So, in the case of *William Mc. Namara and wife v. Fisher*, (c) which was a writ of error in fact from the Court of *Common Pleas* into the Court of *King's Bench*. The defendant in error having brought an action of *assumpsit* in the Court of *Common Pleas* for goods sold and delivered, against one of the plaintiffs in error, *Margaret*, the wife of *William Mc. Namara*, she pleaded *non-assumpsit*, and gave her coverture in evidence; which the defendant in error had answered by proving that the plaintiff, *William*, had lived abroad in the *West Indies* for fourteen years, and that the goods were sold to her as a *feme sole*; that the husband was still abroad; and that she received from *Sir Richard Neave* an allowance of a guinea a week, though it was not secured to her by deed. *Eyre*, Ch. J. before whom the cause was tried, being of opinion, that this created a personal responsibility in her, he directed the jury to find for the plaintiff, which they did.

Upon this the present defendant in error signed judgment, and the plaintiff, *Margaret*, was taken in execution. She then brought a writ of error on the judgment, in her own name, and assigned coverture as error in fact. The defendant pleaded *in nullo est erratum*. But, upon the case being set down for argument in *Easter* term, 39 Geo. III. the Court, on the authority of a case in the Year Book, 14 Ed. III. cited by Mr. Justice *Lawrence*, that the husband ought to be joined, quashed that writ of error.

In *Trinity* term 39 Geo. 3. another writ of error was sued out in the name of the husband and wife, but without the concurrence or knowledge of the husband; and her coverture was assigned as error in fact, as before.

(b) 1 *New Rep. C. B.* 80.(c) 3 *Esp. Rep.* 18.

The defendant pleaded that the husband lived separate and apart from the wife by his own desire; and that the *feme* had a separate maintenance duly paid to her.

The plaintiffs in error took issue; and upon the trial, the same facts were proved as at the first trial.

Lord *Kenyon*, Ch. J. before whom the cause was tried, said, "I think these parties have mistaken their way very much, by coming into this court. I have frequently heard it laid down on the other side of the *Hall*, and that from very high authority, that the proper course in such a case is to file a bill against a married woman and her trustees in a court of equity; and I remember a cause standing over, because that was not done. Here there are no articles of separation: to say therefore, on this evidence, that there is an end put to the conjugal relation between those parties, is what I dare not say, in point of law or of conscience. I am pretty sure, that Lord Chancellor *Ellesmere* has said something in *Belknap's* case (if I recollect right, this case is to be found in Co. Litt. *) which has laid down the law in that case; it is an old case, and of great authority, to show that this kind of proceeding cannot take place. There is no evidence here to show that this woman has a separate maintenance. On this evidence, every man's wife may be said to have a separate maintenance, because her husband, as far as his abilities go, supplies her with money from time to time. There must be a verdict for the plaintiff."

3. *Of Contracts with a Feme Covert sole Trader, &c.*

By the custom of *London* (d) if a *feme covert* exercises any trade in which her husband does not at all concern himself, she may be sued as a *feme sole*, in the *City Courts*, for debts contracted in the carrying on of that trade; and if she has not goods that are not her husband's she must be imprisoned till she satisfies her creditors; and as she may be sued, so she may sue as a *feme sole* for debts owing her, in her way of trade, and within the *city*.

But a *feme covert* cannot sue or be sued as a *feme sole* by the custom of *London* in the superior courts at *Westminster*. Her husband must be joined for conformity. (e)

* 132. b. 133. a. (d) 10 Mod. 6. Vide *Clayton v. Adams*, Ante 173.

(e) *Candell v. Shaw*, 4 Term. Rep. 361. *Beard and wife v. Webb*, 2 Bos. and Pul. 93.

4. *Of Contracts with the Wife before Marriage.*

All the *personal* estate, as money, goods, cattle, household furniture, &c. that were the property and in the possession of the wife at the time of the marriage, are actually vested in the husband; so that of these he may make any disposition in his life-time without her consent, or may by will devise them, and they shall without any such disposition go to the executors or administrators of the husband, and not to the wife, though she survive him. (f)

But choses in action, as debts due to the wife which are to be demanded by action, though they are likewise so far vested in the husband, that he may reduce them into possession; yet if he dies before any alteration made by him, they shall go to his wife, nor shall they, without such alteration, survive to the husband upon the death of the wife, or he have any right to them, but as he is entitled as administrator to his wife. (g)

The husband is also entitled to whatever his wife earns during coverture. (h)

Therefore, a note payable to a *feme sole* or order, who afterwards marries, becomes the property of her husband, and she cannot legally indorse it over to a stranger during coverture. (i)

But where an estate is vested in trustees for the separate use of the wife, the husband cannot maintain any action at law against a stranger for wrongfully receiving the rents and profits thereof. (k)

With regard to debts contracted by the wife before marriage, the law has provided, that if a man marries a woman who is in debt to divers persons, the husband and wife, during coverture, shall be sued for the debts: but if the wife die, and the creditors have neglected to recover their debts, the husband shall not be charged therewith after the death of his wife: for the debts must be recovered in the life-time of the wife. (l)

(f) *Bac. Abr. tit. Baron & Feme, C. 3.*

(g) *Ibid. See also Co. Lit. 351. a. b. n. 1. 3. Mod. 186.*

(h) *Bul. N. P. 136. (i) 3 Will. 5. Stra. 516. 10 Mod. 246.*

(k) *Davison v. Atkinson, 5 Term. Rep. 434.*

(l) *F. N. B. 120. F. Bac. Abr. tit. Baron & Feme, F. Com. Dig. tit. Baron & Feme, N. & 2 C.*

5. Of Contracts for Necessaries provided for a Married Woman.

The husband, during coverture, is not only liable to the debts of his wife before marriage, but is also obliged to maintain his wife, and find her with necessaries, as meat, drink, clothes, &c. suitable to his estate and condition in life. And though the wife has no power to bind her husband by any contract of hers, even for necessaries, without his assent *express* or *implied*, yet it is settled, that whilst she cohabits with her husband, he shall be chargeable for all contracts made by her for necessaries; and his assent thereto shall be presumed on account of the cohabitation, unless the contrary appear. Such contracts, however, are considered in law as the contracts of the husband, and he alone is chargeable. (m)

So, where the husband leaves his wife, or refuses to permit her to live with him; or if he treat her so ill as to oblige her to depart from his dwelling; in either of these cases the law makes the husband liable to her contracts for necessaries.

Thus, in the ^{case} of *Bolton v. Prentice*, (n) which was an action of *assumpsit* for goods sold and delivered to the defendant's wife: the case appeared to be that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again.

After this the defendant and his wife cohabited together for a year, when without any cause appearing, he left her, locked up her clothes, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress she borrowed clothes of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought; and upon trial the jury found for the plaintiff.

Upon motion for a new trial, the court held that the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turn-

(m) *Vide* Manby v. Scot, 1 Sid. 128, 9. 1 Lev. 4. 1 Mod. 128. 1 Salk 118. Com. Dig. tit. Baron & Feme, 2. Bac. Abt. same title, H. (n) 2 Stra. 1214.

ing her away destitute afterwards, gave her the general credit again : and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. They distinguished this case from that of *Manby v. Scott*, 1 Sid. 109, for there the wife was guilty of the first wrong in eloping.

So, in the case of *Thompson v. Hervey*, (c) which was an action brought against the defendant for lodging and necessaries for his wife, during her residence at *Bristol*, (which her health absolutely required;) wherein a verdict had been given for the plaintiff, against Mr. *Hervey*. It appeared from Lord *Mansfield's* report of the evidence that she had herself paid part of the money, viz. what was due to the plaintiff for the former part of the time; and that she had a pension, during pleasure, from the crown determinable at the will of the crown, of 300*l.* a year, granted to her in her own name, but not by any agreement or otherwise appropriated at all to her own use: that at her return from *Bristol*, her husband shut his doors against her; that Mr. *Hervey* had never made or agreed to make any separate allowance to her, or had contributed any thing towards her support, since he had so shut his doors against her; nor had she any use of his table, servants, or equipage: and there was evidence given of his being reputed to have an income of about 1800*l.* per annum.

The Court held, that the husband was liable to this action; and said: "Here is no agreement for a separation: but he has sent her adrift, by shutting his doors against her. He allows her no separate maintenance, nor any support at all. And there is no pretence of this lodging and and other support provided for her by the plaintiff, being improper for her degree and condition of life. And as she had no maintenance from her husband, nor admittance into his house, she was obliged to procure lodging and maintenance somewhere else. Every man is obliged to maintain his wife. The pension is only a voluntary grace and bounty of the crown, and only during the pleasure of the crown; not what any creditors of hers even for her necessary subsistence suitable to her degree and rank of life, can be supposed to give her credit upon."

So, in the case of *Robison v. Gosnold*, (p) where it appeared that a husband discovering his wife to be a very lewd woman, went away

(c) 4 Bur. 2177.

(p) 6 Mod. 171. 1 Salk. 119. S. C.

from her; and she, after having lived several years with an adulterer, was received into the plaintiff's house, who entertained her as the husband's wife. And this action being an *indebitatus assumpsit* against the husband for lodging and dieting the wife. Holt, Ch. J. at *nisi prius*, held, that let the woman be ever so vitious, yet, while she will cohabit with the husband, he is bound to provide necessaries for her, and is liable to an action of such as furnish her with them, for his bargain was to take her for better for worse. In like manner it is, if the husband turns his wife away for her wickedness, he remains still chargeable for her necessaries. But if the wife leaves her husband, they that trust her after it is notorious that she has left him, do it at their peril, and shall not thereupon charge the husband.

And he seemed to be of opinion, that if a wife had run away from her husband, and contracted debts, and after the husband received her, or came after her, and laid with her but for a night, that would make him liable to the debts. Like the case where a wife elopes with an adulterer, though she thereby forfeits her dower, yet if the husband will of his own accord receive her again, she shall have her dower.

So, in the case of *Harris v. Morris*, (q) which was an action of *assumpsit* brought to recover a sum of money, claimed by the plaintiff for meat, drink, and other necessaries, furnished to the defendant's wife.

The plaintiff's counsel stated, that the wife having been turned out of doors by the defendant, had taken shelter with the plaintiff; were she was entertained, and furnished with necessaries.

The defendant denied that she was turned out; but relied on her having been seen in improper familiarities with a person living near her house, though he could produce no proof of actual adultery: That she had formerly eloped for adultery, and been in the *Magdalen Asylum*; but that he had afterwards taken her back: that he had advertised her in the newspapers, and cautioned persons from trusting her on his credit: lastly, that he was a journeyman tradesman, and incapable of making her any allowance.

In answer to the last matter relied on by the defendant, it was proved, that the defendant had said, that his wife had ten guineas a year, independent of him; and that he could allow her 5s. per week addition. This was pressed by the plaintiff's counsel, as hav-

(q) 4 Esp. Rep. 41.

ing been ruled by Lord *Mansfield*, to be evidence of the husband's ability to that extent.

Lord *Kenyon*, Ch. J. said: "The defendant has urged several matters in bar of this action; but none appear to me to amount to a legal defence. With respect to her having been formerly guilty of adultery and having been in the *Magdalen Asylum*, though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back; and she was from that time entitled to dower: she was *spontis retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors.

The next defence is, that he advertised her in the newspaper, and forbid persons to trust her: that cannot avail him; for if he put her out of doors, though he advertised her, and cautioned all persons not to trust her: or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expences.

With respect to the offer of five shillings *per week*, I agree with what my Lord *Mansfield* has said, "that it is evidence to go to the jury of the husband's liability; but the jury ought to consider the terms upon which it was offered." A juror was withdrawn by consent.

So, in the case of *Hodges v. Hodges*, (r) which was an action of *assumpsit* brought by the plaintiff (who was the son of the defendant) to recover a sum of money for the board and lodging of his mother, the defendant's wife. The plaintiff's case was, that the wife had been compelled to leave her husband's house in consequence of gross ill-treatment and cruelty. Evidence was given to this effect; but it appeared, that she had voluntarily left the defendant's house, though it proceeded from apprehensions of his ill-treatment and barbarity.

It was contended, for the defendant, that though in case the husband turns the wife out of doors, he sends with her credit for necessities, the rule of law did not apply, where she voluntarily quitted it.

(r) 1 *Esp. Rep.* 441.

Lord *Kenyon*, Ch. J. said, "That where a wife's situation in her husband's house, was rendered unsafe from his cruelty or ill-treatment, he should rule it to be equivalent to a turning her out of the house, and that the husband should be liable for necessaries furnished to her under those circumstance."

So, in the case of *Ewers v. Hutton*, (s) which was a similar action to the last: And it was proved, that the defendant had treated his wife with much barbarity, and turned her out of doors: that the plaintiff received her into his family, and furnished her with necessaries; for which the present action was brought.

There was also evidence given, that some time after the wife had been turned out, she returned and rung at the bell: the defendant went down to the door, and refused to admit her.

It was proved, that the wife had had between 3 and 400*l.* fortune when she married.

The defence was, that the absence of the wife, for part of the time, was an elopement; as she might have returned to her husband's house: 2dly, That a separate maintenance was secured to her some time after her leaving her husband's house. To prove which, the defendant gave in evidence a deed of separation executed by the husband and wife; but it was not executed by the wife's trustee, who was a party to it.

Lord *Eldon*, Ch. J. said, "There was no doubt of the law, that where a husband, either from ill-treatment, compelled his wife to leave his house, from motives of personal safety, or turned her out of doors, that any person who afforded her protection, and furnished her with necessaries correspondent to his rank and situation in life, could compel the husband to pay for them, but that in ascertaining what suited his circumstances, the fortune which the wife brought could not enter into the consideration: the jury were to regulate their verdict by what the husband's circumstances were when the separation took place.

As to the question of elopement, it did not appear clearly, whether the term *elopement* in the books, meant an adulterous elopement or not: here there was no imputation of an adulterous elopement: but it was settled in a case in Lord *Raymond's Reports* (t) to which

(s) 3 *Esp. Rep.* 255.

(t) I have not been able to find the case alluded to by his lordship in Lord *Raymond's Reports*. And see the cases of *Child and others v. Hardyman*, *post*,

which he subscribed, that if the wife had eloped, and afterwards solicited to be received again, and the husband refused to receive her, from that time he was bound for necessaries furnished to her; and that seemed to be the case, taking it even to have been a voluntary elopement by her.

As to the deed of separation produced, it was waste paper, it was binding in no degree; it was executed by the husband and wife; but the wife had no will of her own; she could execute no deed; she could not covenant with her husband; she could only contract by the means of a trustee, who became bound for the performance of what she contracted to do: here he had not executed the deed. The husband could not therefore be sued; and the deed was of no avail."

His lordship therefore concluded with observing, "that the wife having solicited to be received into the defendant's house and being refused by him, he was bound to provide her with necessaries; and that the deed of separation furnished him with no defence."

So, where a husband goes abroad and leaves his wife, who dies in his absence, a third person who voluntarily pays the expences of her funeral (suitable to the rank and fortune of the husband) though without the knowledge of the husband, may recover from him the money so laid out, especially if such third person be a relation of the wife.

Thus, in the case of *Jenkins v. Tucker*, (v) where it appeared that the defendant married the plaintiff's daughter; and sometime after the marriage went to *Jamaica*, leaving her and an infant child in *England*. During his absence she died; and the action was brought by her father against the husband, to recover the money, which he had expended after her death, in discharging debts which she had contracted while her husband was in *Jamaica*, (by living with her child in a manner suitable to her husband's fortune) and in defraying the expences of her funeral, which were also proportioned to the husband's fortune and station.

The court determined that the husband was liable. Lord *Loughborough*, Ch. J. said: "I think there was a sufficient consideration

post, and *Govier v. Hancock*, *post*, where it was held that a husband is not bound to receive his wife after she has been living apart from him in a state of adultery. See also the cases of *Bolton v. Prentice*, *ante* 186. *Robinson v. Gofnold*, *ante* 187. and *Manby v. Scott*, *post* 193.
(v) 1 H. Bl. 90.

to support this action for the funeral expences, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which the plaintiff paid on this account, was paid to the use of the defendant. A father also seems to be the proper person to interfere, in giving directions for his daughter's funeral, in the absence of her husband. There are many cases of this sort, where a person having paid money, which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid: such as in the instance of goods being distrained by the commissioners of the land tax, if a neighbour should redeem the goods, and pay the tax for the owner, he might maintain an action for the money against the owner.

So, *assumpsit* lies against a husband for money lent to his wife upon his *express assent*. (u) But such an action will not lie on an *implied promise*, though the money be even laid out in necessaries for the wife. (w) And in the first case the money should be stated to have been lent to the husband.

So, in the case of *Stone v. Carr*, (x) it was held, that though a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house, and they become part of his family, he shall be deemed to stand *loco parentis*, and be liable in a contract made by his wife for their education, &c.

It should be observed, that in all these cases the things supplied to the wife must be proved to be necessaries suitable to the estate and condition of the husband; for if they be not he will be discharged.

Though a husband is bound to provide necessaries for his wife as long as she cohabits with him; or whilst he absents himself from her, or she is obliged to live apart from him on account of his ill usage to her; yet if she *voluntarily* departs from his dwelling and lives apart from him without his consent; or, if the husband absolutely

(u) 3 *Wils.* 388. 2 *Bl. Rep.* 872.

(w) 4 *Vin. Abr.* 119. 126, 7. 1 *Salk.* 387.

(x) 3 *Esq. Rep.* 1. *Ib.* 252. *S. P.*

declares his dissent that she shall not be trusted; any person having notice of this dissent, trusts her at his peril; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption. For the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides, and if he does not provide necessaries, her remedy is in the spiritual court.

Thus, in the case of *Manby v. Scott*, (y) where the wife of the defendant departed from him without his consent; and during her absence the husband prohibited several persons, and among the rest the plaintiff, from trusting her: and, after an absence of twelve years, *she made a request to cohabit again with her husband, but he refused to receive her.* The plaintiff sold her silk and velvet to the value of 40*l.* which were found suitable to the degree of her husband.

It was solemnly determined by eight judges against three, that the husband was not chargeable in this case; for the prohibition, here stated, took away all presumption of any consent of the husband to the contract, either expressed or implied.

So, in the case of *Ethorington v. Parrott*, (z) which was an action of *indebitatus assumpsit* for goods sold and delivered. At the trial before Holt, Ch. J. at Guildhall, the evidence to charge the defendant was, that the goods were taken up by the defendant's wife to make her cloaths, and that they cohabited together: but on the defendant's side it was given in evidence, that his wife was an extravagant woman, and used to pawn her cloaths for money to buy drink; that she pawned a suit of cloaths, which cost 7*l.* for 1*l.* 8*s.* and when her husband redeemed them, pawned them again; that at the time of buying these, she had very good cloaths; that she had bought cloaths of the plaintiff before, and her husband had paid for them; but when he paid for them, *he gave notice to the plaintiff's servant, who received the money, that his master should trust her no more, which he promised not to do.* And by Holt, Ch. J. "If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her; but if she runs away from him, he shall

(y) 1 Sid. 109. 1 Lev. 4. 1 Mod. 128. S. C.

(z) 2 Ld. Raym. 1066. 1 Salk. 118.

not be liable to any of her contracts, for it is the cohabitation that is an evidence of the husband's assent to contracts made by his wife for necessaries. But if the husband has solemnly declared his dissent, that she shall not be trusted, any person that has notice of this dissent, trusts her at his peril after; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption. For the wife has no power originally to charge her husband, but is absolutely under his power and government; and must be content with what he provides, and if he does not provide necessaries, her remedy is in the spiritual court. But here were sufficient necessaries provided, and also the husband had forbidden any trusting her, and notice to the defendant's servant usually employed by him in his trade, was a good notice to his master the plaintiff; and he cannot charge the defendant." Therefore he was nonsuited. The learned judge said also, "If a wife takes up silks and pawns them, before they are made into cloaths, the husband shall not be liable for the silks, because they never came to his use: *contra*, if they were made into cloaths, and wore by the wife, and then pawned by her."

But in the case of *Rawlins v. Vandyke*, (a) which was an action of *assumpsit* for the lodging of the defendant's wife and children; and for goods sold and delivered to them.

The plaintiff proved the lodging of the parties at his house, and the furnishing of linen drapery goods to the wife and children of the defendant; which appeared to be necessaries for them.

The defence was, that the defendant and his wife lived separate; that he allowed her ten guineas a week; that the plaintiff had notice of those circumstances, and not to trust her: but the notice not to trust her, was said by the plaintiff to have taken place after the bill for the goods had been delivered.

It was further contended, that there was no evidence that the husband had refused to receive her. But it was given in evidence that Mr. Vandyke, the defendant, had supported a separate establishment for his wife at Bath, where he had visited her once, and at Osborn's Hotel in London; and paid the bills at both places.

Lord Eldon, Ch. J. said: "The defendant's counsel relies on his discharge from this action, first, on the ground, of his living apart

(a) 3 *Esq. Rep.* 250.

from his wife; and there being no evidence that he refused to receive her. My conception of the law is this: that if a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expences. In this case Mr. *Vandyke* has lived apart from his wife, but he has paid her expences incurred in that situation in other places, and has therefore given her credit.

The second ground taken by Mr. *Vandyke's* counsel is, that he gave her a separate maintenance; informed the tradesman of that fact, and gave him notice not to trust her. Separation, with a separate maintenance, was formerly held sufficient to charge the wife, but it is not so held now; the wife is not now liable; but it is a different thing to hold the wife not to be liable, and the husband to be liable. The object of this action is to make the husband liable. If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged for goods furnished to his wife: and if a tradesman has notice of a separate maintenance given to the wife, it is the doctrine of Lord *Holt*, that that shall be notice of an express dissent on the part of the husband, and he shall not be charged; but where the tradesman's demand is for necessaries, it is incumbent on the husband to show that the tradesman knew of the separate maintenance.

The question therefore will be, did Mr. *Vandyke* dissent from furnishing his wife with the things charged? I am of opinion, that for every thing furnished after notice of the separate maintenance, that that amounted to a dissent; and for those, that the defendant is not liable.

With respect to the things furnished to the children, I do not lay it down as the law, that where the children live away from the father, that he is liable, because the things furnished are necessaries; as a father, he has a right to the custody of his children, and may obtain possession of their persons by *habeas corpus*; but where he does not assert that right, and suffers them to remain with their mother, I think he thereby constitutes her as his agent, and authorizes her to contract those debts for clothing and other necessaries; but this I think should be left to the jury."

Where a married woman elopes from her husband, and afterwards contracts a debt, not only the husband is not liable, but the wife cannot be sued either alone, or jointly with her husband.

Thus, in the case of *Hatchett* and another v. *Baddeley*, (b) which was an action of *assumpsit* against the defendant by the name of *Sophia Baddeley*, (without any addition) for money due to the plaintiffs as coachmakers for work and labour and materials, &c. Defendant pleaded *non assumpsit*, and also that she was married to one *Robert Baddeley*, her husband, who was then alive. The plaintiffs replied, *protestando* as to the marriage, that the defendant, before the cause of action accrued, eloped from the said *Robert Baddeley*, and hath ever since lived separate from him, and that the work was done on her credit only. The defendant not rejoining in due time, judgment was signed against her for want of a rejoinder: but it was afterwards moved in arrest of judgment that the replication was bad on the following grounds; 1st, Supposing the facts to be true, it does not therefore follow that she is liable to be sued alone. 2dly, It should not have been alleged that she *eloped*, but that she lived in *adultery*. So is *Ross*. 230. pl. 9. in bar of dower, and *Robins. Entr.* 260: 3dly, It should have stated the cause of action to have been for necessities.

The counsel for the plaintiffs showed cause against the motion, and contended that the replication was good: they said, "Elopement is a well known term in the law, and signifies a wife's departing from her husband and dwelling with the adulterer. *Termes de Ley. Co. Litt.* 32. a. If the wife *elopes*, the husband is not liable to pay for what she takes up on credit. *Langworthy v. Hockmors*, Lord Raym. 444. No not even for necessities. *Stra.* 647. 706. S. P. resolved in *Manby v. Scott*, if they are separated, though not for adultery. And in *Derry v. Duchess of Mazarine*, Salk. 116. whose husband was abroad, the Court contended that they were divorced and refused to relieve her against a verdict.

In support of the rule, the counsel for the defendant argued thus: "The very admission of the fact of coverture destroys the action. If a *feme covert* appears as a *feme sole*, and the plaintiff has judgment against her, she and her husband may set it aside by writ of error alleging the coverture, 1 *Roll. Abr.* 759. *Sty.* 254. 289. The elopement mentioned in the books, is merely a cause of losing the wife's dower, introduced by the statute of 13 Ed. 1. c. 34, and did not exist at common law. It is not incumbent on me to main-

(b) 2 *Bl. Rep.* 1079. Sed vide *Cox. v. Kitchen*, 1 *Bar. and Pul.* 358.

tain that an action lies against the husband for this coachmaker's bill; it is enough that it does not lie against the wife alone. It is the creditor's folly to trust her, and (as is said in *Stra.* 875.) he does it at his own peril."

De Grey, Ch. J. said: "The word *elopement* is not a legal term, nor has any express meaning in the law. It is not to be found in *Bracton*, *Britten*, or *Fleta*; nor is used in the statute of *Westm.*

2. The *Mirror* indeed has the word *elopa*; but in a different sense: and none of the dictionaries or etymologists explain the word, except *Blount* and *Jacob*. Lord *Coke* is the first that I remember to have mentioned it, and he speaks in 2 *Inst.* 435. of a wife's eloping and remaining with an adulterer. The modern books never speak of elopement, but in a criminal view. But it is quite indifferent, as to forming my opinion on this case, in what sense the word is to be taken. The present case is not that of a woman having a separate maintenance, and living apart from her husband by his express permission: but of a wife departing from her husband's house, or if you please eloping, without his consent. She is in every view, even in respect of dower (unless adultery be proved) a *feme covert*; and as such can neither sue nor be sued alone. This is the general law. The exceptions to this, are,

1. Local customs, as in the city of *London*, where a *feme covert*, being a sole trader, may be sued. But there the husband must be joined in the action at the outset, for conformity.

2. The wife of an exile, one abjuring the realm, or perhaps one professed, who are looked upon as dead in law.

3. The same law has been extended to cases, somewhat like the former, as the *Duchess of Mazarine's* case, whose husband lived in *France*.

All these are by the acts of the husband; but no act of the wife can ever make her liable to be sued alone. If she can be sued, she can sue, acquire property, release actions, execute deeds, &c. which would overturn first principles. On the whole therefore I am clearly of opinion the defendant is not in a capacity to be sued alone."

Gould, Justice. "I think this case is not ripe for a general determination upon principles, because, in my opinion, the replication is ill pleaded. *Elopement* is a word of too vague and uncertain a meaning. If adultery is intended by it, it should not be thus in-

sinuated, but plainly expressed. 6 Edw. III. 39. *Rassal. Dowry, Bar. c.* It is on this I found my opinion."

Blackstone, Justice. "It seems to be supposed by the argument, that if the husband is not bound to pay this debt, it follows that the wife may be compelled alone. But this is no legal consequence. I think in the present case, that it cannot be recovered of either. And I see no hardship in a man's losing his money, that avows upon the record, that he furnished a coach to the wife of a player, whom he knew to have run away from her husband. If this were universally known to be law, it would be difficult for such women to gain credit; and this would consequently reduce the number of wanderers. But, be this as it may, I am clearly of opinion, that in no case can any *feme covert* be sued alone, except in the known excepted cases of abjuration, exile, and the like; where the husband is considered as dead, and the woman as a widow, or else as divorced *a vinculo*, Co. Litt. 133. And therefore *Elizabeth Wilnot* whose husband was abroad, when she attempted to sue alone, *Moor*, 851. did it with the addition of *widow*. The contrary doctrine militates against the first principles of the *English* law, which considers the woman's powers, nay almost her very being, as suspended during the coverture. Her contract is merely void so as to bind herself, say all the judges in *Manby* and *Scott*. 1 Sid. 120. She and her husband may plead *non est factum* to her bond, *Salk.* 7. 6 *Mod.* 311. 2 *P. Wms.* 144. If judgment be had against her, or she be outlawed, her husband and she may reverse it by writ of error, *Bro. Abr. Error*. The very forms of the action demonstrate the same thing. If sued alone she can have no addition (as in the case at bar) which is in the teeth of the statute of 1 Hen. 5. c. 5. If sued by her maiden name it is misnomer, 6 *Mod.* 311. If by her husband's name and as *widow*, it is the like. She cannot put in bail without her husband, *Cro. Jac.* 445. And as the previous steps are thus embarrassed, so after judgment the remedy must prove defective. No *elegit* can go against her lands, else this would be a mode of alienation by a *feme covert* without a fine. It would be endless to pursue this idea through all its legal absurdities. And therefore I am clearly of opinion for arresting the judgment."

Nares, Justice, concurred in opinion, that no action would lie against a *feme covert* without her husband. Therefore the judgment was arrested *per totam Curiam*.

So, if husband and wife be separated by mutual consent, and the husband secures to her a separate allowance by deed ; and this is generally known in the place where the husband resides, he is not liable for necessaries furnished his wife in a strange place where the circumstances of the separation are wholly unknown.

Thus, in the case of *Todd v. Staker*, (c) which was an action brought by the plaintiff, being an apothecary, for medicines found for the defendant's wife. It was proved, that the defendant and his wife had been separated by consent for five years ; and that upon the separation the defendant signed articles to certain trustees, by which he obliged himself to allow his wife twenty pounds a year ; which he had done accordingly ever after ; that the plaintiff, when he furnished the defendant's wife with these medicines, did not know that she was a married woman, &c. And it was ruled by *Holt*, Ch. J. that the defendant was not bound to pay the plaintiff's bill. For though the plaintiff had not personal notice of their separation, and though it was not the general reputation in *London*, where the plaintiff lived, that the defendant and his wife were separated, yet since it was the general reputation in the place where the defendant lived, and that for five years past it was enough to exempt the defendant's wife from being capable to charge the defendant, though for necessaries. But if the wife had come immediately from her husband after the separation, before it could have been publicly and generally known, and had taken up necessaries upon credit, the husband would have been liable.

But if the husband in such case fails to pay the stipulated allowance, he is liable for necessaries furnished his wife.

Thus, in the case of *Nurse v. Craig*, (d) which was an action of *indebitatus assumpsit* for meat, drink, washing, lodging, and other necessaries, with counts for money lent and advanced, paid, laid out and expended, had and received, and on an account stated.

At the trial, before Sir *James Mansfield*, Ch. J. it appeared in evidence, that the defendant and his wife, having agreed to separate from each other in the year 1802, a deed of separation was executed in the year 1803, between the defendant, who was a taylor in low circumstances, of the first part, his wife of the second part,

(c) 1 *Lord Raym.* 444. 12 *Mod.* 244. S. C.
(d) 2 *New. Rep.* C. B. 148.

and the plaintiff who was sister to the defendant's wife, of the third part, by which the defendant covenanted with the plaintiff, and agreed with his wife that he would permit his wife, to live apart from him, as a single woman, and would suffer her to enjoy all the effects then in her possession, or which she might thereafter acquire, notwithstanding her coverture; and assigned the same to the plaintiff, as her trustee, and made the plaintiff his attorney to sue for the same in trust for his wife, and further covenanted with the plaintiff, that he would pay unto his wife, or to such person as she should appoint, for and towards her maintenance, an annuity of 13*l.* at the rate of 5*s.* per week, during her life for all such time as she should live separate and apart from him, which she agreed to accept, in full satisfaction, for her support, maintenance, and alimony: provided, that if the defendant should pay any debt which his wife, during such separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the said weekly sum of 5*s.* until he should be reimbursed: that the defendant's wife upon this separation taking place, went to live with the plaintiff, her sister, and was furnished by her with the necessaries for which this action was brought; and that the defendant, having for some time failed in payment of the weekly allowance stipulated by the deed, this action was commenced to recover from him the amount of what had been furnished to his wife. In the course of the trial the deed of separation having been produced, the learned judge declared his opinion, that the plaintiff could not maintain the present action, framed as it was, and accordingly nonsuited the plaintiff.

But a rule *nisi* was obtained for setting aside this nonsuit; and after argument the Court made the rule absolute. The learned judges, however, not being agreed, delivered their opinions *seriatim*, as follow:

Chambre, J. "In general where a separation of husband and wife takes place by consent, the obligation to maintain the wife lies upon the husband, unless she forfeits her right to that maintenance by her own misconduct. A provision for a separate maintenance is of modern introduction. Lord *Mansfield*, in the case of *Corbett v. Poelnitz*, 1 Term. Rep. 5. states the origin of this practice: he says in the ancient law there was no idea of a separate maintenance; but when it was established, what said the courts? That the husband shall not be liable even for necessaries; and they said so, because convenience and justice require it. And *Ashbursh, J.* says,

J. says, that it would be unreasonable to permit the wife to affect the property of her husband, except where he will not allow her necessaries; for which her contracts are the contracts of her husband. Now if reason, justice, or humanity ought to govern in the present case, I think it my duty to consent to the allowance of this action, since all the reasons upon which exceptions to this kind of action have been founded, totally fail in the present instance. I will state the cases. In *Todd v. Stokes*, 1 Salk. 116. Holt. Ch. J. says, if *baron and feme* separate by consent, and she has a separate allowance, it is unreasonable she should still have it in her power to charge him. The case states that the wife had a separate allowance of 20*l. per annum*, and it may be presumed that the allowance was regularly paid; but this fact does not rest upon presumption; for, according to the report in *Ld. Raym.* 444; it was averred in the plea that the allowance was paid according to the articles. In *Cragg v. Bowman*, 6 Mod. 147. where an action was brought for lodgings supplied to the wife of the defendant, who had parted from him by consent with a separate maintenance, and had lived in adultery, but without the plaintiff's knowledge, the plaintiff was nonsuited; but it is expressly stated to have been proved, that the maintenance was duly paid to her, which confirms the idea that an actual payment of a maintenance is necessary to discharge the husband. The declaration in *Corbett v. Poelnitz* also states the payment of the separate maintenance. In this case the object was to show that the wife herself was liable according to the doctrine which then prevailed, for which purpose it was necessary to show that the husband was not liable. And in *Ringhead v. Lady Langborough*, 1 Term Rep. 6. The defendant having pleaded coverture, the plaintiff, in his replication, stated not only that she had a separate allowance, secured by deed, but that it was duly paid. So in *Barwell v. Brooks*, Cooke's Bank. Laws 29. the replication stated that the separate maintenance was regularly paid. And in the last instance of an action brought against the wife, viz. in *Marshall v. Rutton*, where it was determined that the wife was not liable, the replication in like manner stated that the separate maintenance had been duly paid. So that, in all these instances it appears to have been thought necessary to lay a foundation for the exemption of the husband, by showing that the maintenance had been duly paid as well as secured. Thus it stands on the authorities. In point of reason I cannot see the least shadow of doubt. The case may be considered as in some measure analogous to an accord

accord and satisfaction, where the accord avails nothing unless satisfaction be made. Of what use is the covenant for an allowance, if the maintenance be not paid? It does not give a credit to the wife; for no action can be brought against her. It is to supply her with ready money; for if she have a provision which is duly paid, she will have the means in her hands of acquiring all the necessaries of life suitable to her degree. If tradesmen give her credit, it is their own fault; they can neither sue her nor the trustee; and if the mere covenant exempt the husband, a person who has provided clothes or meat for the wife may be compelled to seek his redress in the court of equity, and in the mean time the wife must starve. It is unreasonable in the highest degree to consider that as a ground of exemption which the law itself would impose. In the present case the inconveniencies of the doctrine contended for are illustrated in the strongest manner, on account of the smallness of the provision; the allowance is 5s. per week. Is this woman to be taken into a court of equity, and to wait the usual period for decisions of this sort? how is she to subsist in the mean time? The inconveniencies indeed might be in some degree the same, though the amount of the provision were greater. No property is conveyed to the trustee; it is a mere personal contract; and if the allowance were a thousand pounds *per annum*, and the husband chose to withhold it, no tradesman could venture to trust the wife, since he could have no reliance on any thing but her honour for being reimbursed, after a dilatory course of proceeding in equity. I think, therefore, that the ground on which the exemption was supposed to be founded, totally fails; and that there is neither reason nor justice to support it. I am therefore of opinion, that the nonsuit ought to be set aside. Whether this will ultimately avail the plaintiff in this action, I will not undertake to say. There may, perhaps, be other grounds of defence; but as the nonsuit rested on the ground that has been stated, and that merely, I think that it ought to be set aside."

Roche, J. "I have entertained great doubts on this subject; but my present opinion is in favour of the action. The plaintiff being a trustee in the deed of separation, had another remedy; she might have brought an action on the deed. At first I was, at a loss how to imply the assent of the husband to the contract of the wife, so as to support the action of *assumpsit* against him; and I thought that it would be hard that the husband should be liable to two actions. But I have got over these difficulties. First, this action is brought for the immediate supply to a woman supposed

to be in actual necessity; and though the plaintiff be the trustee in the deed, and was therefore entitled to another remedy, yet as the money was to have been paid to her in the first instance, I think that she was warranted in supplying the wife with necessaries, and taking her choice of actions for her own indemnity. As to the assent of the husband, I think that the law will raise an *assumpsit*, so as to make him liable; and though by these means he becomes subject to two actions, his liability has been occasioned by his own default. If he had paid the annuity regularly, this question never could have arisen; for the trustee and the husband had agreed what should be the *quantum* of necessaries. It appears to me that the defendant has given sentence against himself by the articles of separation; for it is only provided that he shall be indemnified against debts which his wife may contract during the separation, and payment of the annuity; so that he does not stipulate for an indemnity, except during such time as the annuity shall be duly paid. On the best consideration which I have been able to give the case, I think the nonsuit ought to be set aside."

Heath, J. "The question is, whether a separate maintenance, secured by deed to the wife, be sufficient to discharge the husband from his liability to provide necessaries for her, where that maintenance has not been duly paid? Five or six cases have been mentioned by my Brother *Chambre*, in which a separate maintenance has been pleaded, and payment averred; and I cannot help thinking that Lord Ch. J. *Holt*, in the case of *Todd v. Stokes*, laid a stress upon that circumstance; for why should he suppose that tradesmen would trust a wife upon her own credit, unless the circumstance of payment operated upon his judgment. The allowance, without payment, in this view of the case, would be totally immaterial. In *Bacon's Abridgement*, title *Baron and Feme*, H, it is laid down that if a husband allow his wife a separate maintenance, he shall not be liable during the time he pays such maintenance. These cases, therefore, in which the payment of maintenance has been set forth in the pleadings, and the passage to which I have referred in *Bacon's Abridgement*, strongly show the sense of the profession from the time of Lord Ch. J. *Holt* to the present hour. As to principle, it is the duty of the husband to provide necessaries for his wife. The question is, whether he discharges that duty merely by entering into a covenant with a trustee for payment of an allowance? If he refuse to perform that covenant, the wife may be starved before redress can be obtained. The common law does not relieve any man from an obligation on the mere

mere ground of an agreement to do something else in its place, unless that agreement be performed. Accord without satisfaction is no plea. In this case the wife is no contracting party to the covenant; she only assents by her signature, and if she had not executed the deed, she would have been equally bound by accepting the maintenance. The case is not varied by the circumstance of the plaintiff being the trustee in the deed. The agreement could have no operation in destroying the husband's liability by transferring the credit to the wife, unless accompanied by payment; she cannot be in a worse condition than if she cohabited with her husband. Now in the case of cohabitation, the husband would be liable for necessaries, unless he supply his wife with money to furnish herself; for his assent to her contracts must either be express or implied. In the case of *Morton v. Wilbent*, Skin. 348, the defendant and his wife lived in the same house, and the wife had a separate allowance of 50*l. per annum* for her clothes. The action was brought for goods furnished to the wife; and *Treby*, Ch. J. said, 'that if the goods were furnished upon the credit of the husband, the plaintiff was entitled to recover, if the goods were suitable to the quality of the wife, he not having had notice of the allowance; but if he knew of the differences between the husband and wife, and sold the goods only to ruin the husband, the latter should not be chargeable;' but it having been proved that the goods were used by the wife in the presence of the husband, the jury found a verdict for the plaintiff. This was a case where the husband and wife lived in the same house, and the latter had been supplied with money, yet the assent of the husband was implied from his having seen his wife make use of the goods. In the present case, where the husband and wife are separated, and no money has been given to supply the wife with necessaries, the consent of the husband may be much more strongly implied. In the case of *Manby v. Scott*, which is best reported in 1 *Sid.* 109. it was said that a general prohibition to all persons to supply the wife with necessaries is void. But if such a covenant as this, without payment, be sufficient to exempt the husband from his liability, it would have the same effect as a general prohibition. At common law the wife may have recourse to any friend for necessaries, if the husband refuse her, and the husband is bound to pay for them; for when the law imposes a duty, it raises a promise on the part of the person upon whom it is imposed, to discharge it. All deeds of separation suppose the husband's liability, for they all contain a covenant to indemnify him against the wife's debts. To suppose that a woman who is parted from

her husband, under an agreement for a separate maintenance, is not by law entitled to charge her husband with payment for necessaries, when he withholds the stipulated allowance, shocks my humanity and revolts my reason."

Sir *James Mansfield*, Ch. J. "I differ from my three Brothers in this case; but I have this satisfaction, that if my opinion be wrong, it will be of no consequence, since the opinion of my Brothers must prevail, and justice will be done. After giving to the subject the best consideration in my power, I cannot but entertain the same opinion now which I held at the trial. In the first place I think that a general provision for the separate maintenance of the wife, whether the husband pays or not, deprives the wife of the advantage of the common law, and prevents the husband from being sued, either in *assumpsit*, or *debt*, for necessaries furnished for the wife. And I also think in this case, that if the general law were not so, this action could not be maintained; because the person who supplied the necessaries was the very person with whom the covenant was made, and must therefore be presumed to have trusted the wife, on the credit of the deed. Not that I think this makes any difference in point of law, but with respect to the remedy there is this difference, that the plaintiff has a short remedy by action on the covenant; whereas, in other cases, the person furnishing the necessaries would have no remedy, but must trust to the honour of the wife. Every man who gives credit to a married woman living apart from her husband, gives credit to her representations; unless he happens to be personally acquainted with the articles of separation. An objection has been raised to the legality of the covenant in this deed; but such covenants have been so long supported, both at law and in equity, that it is impossible now to give weight to the argument. The covenant contained in this deed, therefore, must be considered as valid. Here the husband and wife separate, and the husband covenants with the present plaintiff to pay five shillings *per week* by way of maintenance, to his wife, and the mode of payment is either to the wife herself, or to such person as she shall appoint. Upon failure of payment, there is no doubt that the plaintiff may maintain an action on the covenant. This mode of covenanting to pay so much money is not uncommon; sometimes the provision is made by settling an estate with power of entry; sometimes by setting apart money in the funds; but there is no difference with respect to the husband between one mode and the other; one may be a better security than the other, but in each case the husband is to pay the money, and he

he parts with some portion of his property for a separate maintenance for his wife. In all these cases the person who gives credit to the wife is without remedy; the wife herself is without remedy. If an ejectment be brought for lands, the demise must be by the trustee; money in the funds must be sold by the trustee. An action of covenant must be brought by the trustee. The only way, therefore, by which the wife can compel payment, must be by proceeding in equity, and though it may seem ridiculous to send her to a court of equity to compel payment of so small a sum as 5*s.* per week, yet the rule must be the same whether the sum be great or small. It seems to me that when agreements of this sort are entered into, the husband is bound to pay the sum for which he covenants, and no more; to that extent he must pay, though it should amount to three times as much as his wife's maintenance. The effect is to make the separate provision the separate property of the wife. She may mortgage it. If she save any thing and die, she may dispose of it by will, without consent of her husband. This has been long since determined in equity. By these means she has, in a certain manner, established by deed a separate fortune in herself. She lives by herself. If then persons under these circumstances trust her with such a provision in her hands, can they in general be considered as trusting her on that rule of law, that a husband, in consequence of his obligation to provide for his wife, is presumed to assent to the supply of necessities? When he has made a distinct provision; his assent to any other mode of provision I cannot presume; much less can I find a ground in any decided case, for supporting a different mode of provision than that which is contained in the deed. Where I see a covenant to pay a specific sum, I cannot find a ground in law for supporting an *assumpsit* on the presumed assent of the husband. I forbear to cite cases, because many are to be found in every equity report which show that this is the separate fortune of the wife, that she may dispose of it as she pleases. A difficulty has occurred to me with respect to the question of payment, which I have not been able to get rid of. It is supposed that, notwithstanding the provision is a separate maintenance and fortune to the wife, yet, unless the husband pays, the common law right arises. I have endeavoured to satisfy myself how long payment must be delayed before the common law right arises; sometimes payment is to be made half-yearly; where it is to be made out of estates, it is according to the reservation of rents. These are sometimes quarterly, sometimes half-yearly. How long must it be after the end of the quarter, or half-year, before the common law right arises?

arises; is it to be a week, a fortnight, or a day? The wife must have meat and clothes from day to day. If it arises upon non-payment, and payment should be delayed for a month, those who give credit to the wife in the mean time must trust her on the common law right, and if an action were brought for necessaries, the jury might think that three times as much ought to be allowed as the sum agreed upon. Suppose part only to be paid, to what extent is the husband liable to be charged? It may be said that these difficulties are occasioned by the husband breaking his covenant. But there is another difficulty, if the common law right arises upon non-payment. Does the covenant ever revive again, or is it entirely gone? I should think that it is entirely gone. If the husband once become subject to pay for necessaries, in consequence of not paying the stipulated maintenance, when is the covenant to revive again by payment of the stipulated sum? These certainly are difficulties, but without these I should be of opinion, on the general ground, that where a provision is secured to the wife as her separate property, and she lives as a *feme sole*; the persons trust her upon her own credit. The protection given to the husband against the debts of the wife, is merely a power to retain so much as he shall be obliged to pay; but this is no security, for a jury may think that five times as much ought to be recovered for necessaries as the amount of the sum stipulated. In common cases there is a covenant on the part of the trustees, to indemnify the husband against all debts of the wife, so long as they shall live separate. But if the husband, in such a case as this, be obliged to pay debts of the wife, that covenant ought to be confined to the time during which the husband shall continue to pay the maintenance, and it ought to be expressed, that if the husband delayed payment for such a time, he should be liable to pay those who trusted his wife for necessaries. There ought also to be some proviso to guard against the doubt whether the covenant was to be entirely done away, or only suspended by non-payment. As this action is brought by the trustee, no difficulty can arise respecting any other action. But suppose some other person had supplied the necessaries and brought the action; according to the doctrine, that payment of maintenance is necessary to exempt the husband, the plaintiff must have recovered for necessaries. Then if the trustee had brought an action on the covenant for non-payment of maintenance, could the first action be pleaded in bar? If not the husband would be liable to two actions, though the object of the deed was to make him liable only to one, and to relieve him from all other obligations. Where a woman is put into a situation

situation with respect to certain property as a *joint sole*, no credit is given to the husband, but those who supply the wife trust only to the separate fortune which they know that she has. Nor can any assent of the husband, as it appears to me, be implied, where he has executed a deed covenanting to pay a certain stipulated sum; for I cannot imagine that he could mean to make himself liable to any other payment. In this particular case, however, it seems quite impossible to say that the husband has assented to raise any implied *assumpsit* to pay the plaintiff upon any other contract, but that which is contained in the deed by which he covenants to pay her a certain stipulated sum. Suppose the husband had known that his wife lived with the plaintiff, could it have entered into his mind that he was to pay more than the sum mentioned in the deed? This would be not only to imply *assumpsit* without ground, but directly contrary to the fact: it would be implying an engagement of one sort, when there is another engagement totally contradictory to and inconsistent with it. It has been supposed that it would be hard upon the wife, if this action could not be supported; that hardship I do not feel. In the first place, the plaintiff trusted the wife when she had a remedy in her own hands, and she could have no difficulty in trusting the wife to the extent of the money which she was entitled to recover; but it may be observed in general, that whoever trusts a married woman, trusts to her honour only. If the wife says that the money has not been paid, you must depend upon her word for the truth of the assertion; you must depend upon her honour for making use of the remedies against her trustees to compel the payment. And if the money be paid to the wife, the creditor must trust to her honour for paying it over to him; for I know of no remedy by which she may be compelled to do so. A court of equity has never gone the length of charging the separate estate of a married woman, except on the ground of agreement. Where the wife has agreed to sell, the Court will compel the sale. *Grigby v. Cox*, 1 Ves. 517. Or if she enter into a joint bond with her husband, the Court will charge the rents and profits of her estate with payment. *Hulme v. Tenant*, 1 Brown, 16. All these depend on agreement, but I know of no case where, on the mere ground of things being supplied to the wife, a court of equity has compelled her to pay those who have trusted her; and it is quite clear there is no remedy at law. It is not only in this case, therefore, where payment of maintenance has been withheld, that credit must be given to the equitable rights of the wife, and to her honour for enforcing them, and applying the money in payment

of her debts. I admit, that the practice of averring the payment of the separate maintenance in pleading, shows the apprehension either that the payment was necessary, or at least that it made the case stronger. But the language of the cases themselves impress on me a different idea of the opinions of the Judges who decided them. In *Todd v. Stokes*, though payment had been made, nothing is said upon the subject. The language of Lord Holt is, "if *baron* and *feme* separate by consent, and she has a separate allowance, it is unreasonable she should have it still in her power to charge him." Now what is a separate allowance, but an agreement for an allowance? He goes on, "and it is not to be presumed but tradesmen that deal with her trust her on her own credit, and not on the credit of her husband." Did Lord Holt suppose, that if the husband omitted to pay the allowance for a month, that he might be charged? If so, the tradesman would not trust the wife on her own credit, but on the credit of the general law. Neither in *Salkeld* or Lord Raymond is any reliance whatever placed on the circumstance of payment. According to the report of the same case in 12 Mod. 244. the second resolution was this, "that if husband and wife part by consent, and the husband secure her an allowance, it is in consideration that he should not be charged any more by her; and it is unreasonable he should be charged for victuals or physic, or other necessaries after." What is the meaning of this? As soon as the deed is executed, the allowance is secured, and I know of no difference between a security by covenant, by conveyance of lands, or by transfer of funds. Is it not clear then, that the person who stated that resolution supposed that securing the allowance put an end to the common law obligation? If payment had been considered as necessary, it is natural that it should have been added. The terms of the resolution require that it should only be secured. The case of *Angier v. Angier*, which is to be found in 2 Eq. Ca. Abr. 150. *Gilbert Eq. Rep.* 152. and *Prec. in Chan.* 499. strongly implies that a neglect to pay a separate maintenance would never raise a common law obligation against the husband. A bill was brought by the wife's *prochein amy* against her husband, for a special execution of articles, whereby the husband was to allow her 5*l.* *per annum*, separate maintenance, and he had a decree for the arrears and growing payment in 5*l.* *per annum*; and the Lord Chancellor said, "where a husband makes a separate provision for his wife, he is not chargeable by law for her debts;" but though that were so, yet to avoid the expence he might be put to in defending such

suits, his lordship sent it to a master to settle a security to indemnify the husband against the wife's debts. Here the separate maintenance had been withdrawn for some time; yet the Lord Chancellor says, where a husband makes a separate provision for his wife, he is not chargeable by law for her debts. In the common sense of the word, when a man executes any such securities as I have before mentioned, he makes a provision for her. It may be observed, that the Chancellor decreed all the arrears and growing payments to be made, but if the law were as now contended for, some inquiry ought to have been made, whether any debts had been contracted by the wife for which the husband was liable, and a deduction should have been made of the amount: no such deduction, however, was made. These cases, therefore, when fairly expounded, seem to show the payment has never been considered as an essential circumstance. According to my own recollection of what has fallen from Lord *Mansfield* upon this subject, I have the strongest impression of having heard him, over and over again, declare, that where a separate maintenance was agreed upon, it put the parties in a new situation, and that the husband was relieved from any common law obligation, being subject to no other than that which was contained in the deed of separation. But my brother *Chambre's* recollection is different from mine on this subject, and I defer to his memory as better than my own. There is one circumstance, however, which weighs very strongly with me in this case, that no instance is to be found in which such an action has ever been maintained against a husband who had agreed to make a separate maintenance; and yet there must be many cases in which payment must have been delayed beyond the stipulated time. I cannot say how long these deeds may have been in use, but they certainly are of earlier date than any of the cases in our law books, which have been referred to. In 1 Eq. Ca. Abr. a case is referred to in *Tothell's* transactions in the High Court of *Chancery*, page 97, to show, that a woman who has a separate maintenance may dispose of what she saves out of it by will. That was about the year 1720. The date of the case in *Salkeld* is the 8 W. III. And in modern times these deeds have been very frequent, yet no instance is suggested of an action like this having been maintained. These contracts for separate maintenance would be of very little use if the husband's exemption depended on payment; for if a husband puts his wife into a lodging, and pays her a reasonable sum for maintenance, that will be an answer to an action at common law. It seems to me, therefore, in gene-

ral, that where a man has entered into a contract, and secured a separate maintenance to his wife, the common law obligation is at an end, and the persons who trust the wife, trust her on her own credit. But if that be not so under the general law, still I think that where a person trusts her, having a deed in his own hands, empowering him to compel payment of a stipulated sum, the court cannot raise an *assumpsit* by implication in his favour against the husband. I differ from my brothers, but the judgment of the court is that the rule be made absolute."

Where the wife elopes from her husband, and lives in a state of adultery, he is not liable for necessaries, though she be even desirous of returning, and offers to live with her husband.

Thus, in the case of *Morris v. Martin*, (e) which was an action for meat, &c. provided for the defendant's wife. The defendant proved that she went away from him with an adulterer: Sir Robert Raymond, Ch. J. held, that the husband should not be charged for necessaries provided for her, though the plaintiff had no notice.

So in the case of *Child and others v. Hardyman*, (f) which was an action for linen sold to the defendant's wife. Upon *non assumpsit*, the delivery was proved. On behalf of the defendant it was proved, that she had lived in a very lewd manner; that one Nott frequently came to her, at her husband's house, that they were locked up together in a bed-chamber; and that other indecencies passed between them. It was also proved, that she several times went to the house of this Nott, a gentleman in *Wiltshire*, who lived within three miles of the defendant's house. It did not appear farther than that the husband disliked her going and staying at Mr. Nott's: But under these circumstances they continued to live together. Afterwards on the 18th of *October* 1726, she went away from him, and went to *Marlborough*, where she resided for some time. But after leaving her husband's house it did not appear that she ever saw Mr. Nott, or lived in a lewd manner. After some time she sent Lucas, an attorney, to her husband, to desire that he would receive her again; the husband told him, that if she came again she should never sit at the upper end of his table, nor have the government of the children, but should live in a garret. Then Lucas proposed to him, to make her an allowance, and proposed

(e) 1 *Str.* 647. See also 2 *Str.* 706. 12 *Mod.* 372. *S. P.*

(f) 2 *Str.* 874, 5.

about 8*ol.* or 1*col.* *per annum*, he being worth about 5 or 6*ool.* *per annum*. But that was not complied with; and afterwards she came to *London*, and bought the linen to the amount of 53*l.*

Chief Justice *Raymond*, was of opinion that the plaintiff should be called. And accordingly he was nonsuited. He held, "if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. And this had been so adjudged in two or three cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he does not absolutely refuse to receive her again: but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage."

So, in the case of *G. v. Hancock*, (g) which was an action of *assumpsit* brought by the plaintiff for the board and lodging of the defendant's wife. The defendant, having committed adultery with a woman of the name of *Bazely* whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband would not receive her; and this action was brought for her board and lodging subsequent to that time. *Buller*, Just. before whom the cause was tried, was of opinion that the husband was not bound to receive the wife after she had committed adultery, and consequently was not bound to support her; and he directed a verdict for the defendant, with liberty for the plaintiff to move to enter a verdict for him, if the Court of *King's Bench* should be of opinion that the defendant was liable under these circumstances. Accordingly the plaintiff moved to set aside the verdict, on the ground that as the defendant had been the aggressor, and had turned his wife out of doors at a time when there was no imputation on her conduct, he was bound to provide for her, notwithstanding she afterwards committed adultery; that in this respect it differed from the case of the wife being the aggressor, and eloping with an adulterer, in which case the husband was discharged; that it had never yet been determined that under these circumstances the husband was not liable, and that upon principle he was liable.

But the court said, "That though this precise case did not appear to have been controverted before, it was probably because the point had not been doubted; and that it must be governed by the same principle on which it had been determined that the husband is not liable in cases where the wife goes away with an adulterer. That this was not a modern rule, but was mentioned by Lord Coke, that if a wife go away with an adulterer she loses her dower. That the question depended upon this, whether the necessaries were provided before or after the wife had committed adultery: if after, the action could not be maintained. And that in this case if the wife had instituted a suit in the *Ecclesiastical Court* against the husband for restitution of conjugal rights, they would not have assisted her." The rule was accordingly discharged.

But, in the case of *Norton v. Fazan*, (b) which was an action of *assumpsit* for necessaries found for the defendant's wife and children. The facts were these: Some time previous to the delivery of the goods, the defendant having discovered that his wife kept up an adulterous intercourse, with another man, separated himself from her, leaving her in possession of the house which he had inhabited, together with two children bearing his name. In this house she was living in a state of adultery, at the period when the goods in question were delivered. The defendant had made no regular provision for his wife. The cause was tried before *Eyre*, Ch. J. who was of opinion that if the plaintiff knew or ought to have known that the separation proceeded from the adultery of the wife, the jury should find for the defendant; if not, that the plaintiff was entitled to recover. The jury found a verdict for the plaintiff.

Upon a motion for a new trial, the court were of opinion that the plaintiff was entitled to recover. And *Eyre*, Ch. J. said: "If the defendant in another action brought against him by some other tradesman, shall be able to establish the notoriety of his wife's situation, he may defend himself. But as the case stands at present this woman appears to have been living in a house in which she was placed by the defendant himself, together with two children bearing the husband's name, both of whom were born in wedlock. It is true that she had an adulterous intercourse with another man, but that was not proved to be known to this tradesman. If the defendant can bring it home to any other tradesman who shall be in

(b) 1 *Bor. and Pul.* 226.

the same situation as the present plaintiff, that he did know or ought to have known the circumstances under which the wife was living, the defendant may, perhaps, be able to prevent another verdict passing against him."

Buller, J. "Every case on the facts is peculiar to itself, and this is so different from every other case which has been decided in *Westminster Hall*, that I consider it as anomalous. The verdict is clearly and strictly right. The wife committed adultery for a considerable time while she was living with her husband; he voluntarily yielded his bed to the adulterer and made no provision for her. Then what colour of defence is left? knowing of her criminal conduct and having made no provision for her, he must maintain her as before."

It is observed (i) where the husband and wife are separated *a mensa et thoro* by sentence in the *Ecclesiastical Court* the law allows her alimony at the discretion of the judge, unless she has eloped and lives with an adulterer; and as the common law gives her a writ to recover this, it would seem that the husband is excused from the obligation of her contracts. So, where she is sentenced to a temporary confinement as a punishment for some crime, the husband has been held not liable to her agreement, even for necessities, if she is kept in an improper place by the covin of the gaoler. (k)

But in the case of *Manby v. Scott*, (l) the judges who argued for the plaintiff laid it down as clear law, that if a wife be prisoner for felony, and the gaoler provides her with food, that the husband may be charged for it.

6. Of Contracts made by a Woman living with a Man as his Wife.

If a man and woman live together, and pass in the world as husband and wife, the man shall be liable to all contracts entered into by the woman in the same manner as he would have been liable if they had been actually married. (m)

(i) 2 *Str.* 1214. n. 1. 1 *Bl. Com.* 441. *Ellah v. Leigh*, 5 *Term Rep.* 679.

(k) *Vide Fowles v. Dinely*, 2 *Str.* 1122.

(l) 1 *Sid.* 118. But see 2 *Lev.* 16

(m) 12 *Mod.* 372. *Vin. Abr. tit. Baron & Feme, D. b. pl. 38. Cowp.* 233.

So, in the case of *Watson v. Threlkeld*, (n) which was an action of *assumpsit* brought to recover the amount of a quantity of linen drapery goods, furnished by the plaintiff to a woman who passed for the wife of the defendant.

The plaintiff proved the delivery to the woman at the defendant's lodgings; that he had himself chosen some of the articles for her; that she used his name, and was called Mrs. *Threlkeld* in his presence.

The defence relied on was, that this woman, was not his wife though she lived with him as such, but was a kept woman, and that that circumstance was known to the plaintiff when the goods were furnished. It was then pressed by the defendant's counsel, that however it had been held, that if a man permitted a woman to use his name and pass for his wife, he thereby subjected himself to the payment of her debts; it had only gone to those cases where the tradesman had not known the real situation of the parties, but believed the woman to be actually married; that it was meant as a punishment on the man, who, by permitting a woman to use his name, had thereby given her a false credit, derived from his situation in life, as passing for his wife; but in the present case no such deceit was practised, no such false colours held out; the plaintiff knew that the defendant was not married, so that he could not look to his credit, but to the woman's own, and that the plaintiff should therefore be nonsuited.

Lord *Kenyon*, Ch. J. "It is certain that if a man has permitted a woman, to whom he was not married, to use his name, and pass for his wife, and in that character to contract debts, he is liable for her debts; and I am of opinion that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from *his* name and cohabitation, and it is not to be supposed that the tradesman could look to the credit of a woman of that description, and not to that of the man by whom she was supported: I shall hold the credit to be given to him, and that he is liable."

His lordship added, "What, however, I have said must not be taken to be the case of a common strumpet, who may assume the name of a person, without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family."

(n) 2 *Esp. Rep.* 637.

So, where a woman marries a second husband living the first, the second not being privy to it; *Parker*, Ch. J. said (o) that for what she acquired during the cohabitation, he would esteem her as a servant to the second husband, and that he was entitled to the benefit of her labour.

7. *In what Cases Husband and Wife ought to sue and be sued jointly.*

Upon all contracts made with the wife before marriage, the husband and wife must sue and be sued jointly. (p)

So, they ought to sue jointly in actions upon *promises*, which arise during coverture, where the wife may have an action for the same cause, if she survives her husband.

Thus, if a *feme covert* has a mill, and one agrees with the husband and wife to grind all his corn at the mill, under a penalty in default thereof, they ought to join; for the action would survive to her. (q)

So, if a man promises to give a 100*l.* to the wife of J, S. they ought to join in action for the recovery thereof. (r)

So, in an action for any thing due to the wife *en auter droit*, they ought to join: as if they sue for a debt, &c. to the wife as executrix or administratrix. (s)

But on a promise to pay a husband money due to his wife as executrix in consideration of his forbearing to sue for it, the husband alone ought to sue (t)

8. *In what Cases the Husband may sue alone, or join with his Wife, and when he must sue alone.*

When the wife is the meritorious cause of action, it has been ruled, (u) that the husband alone may sue, or the husband and wife

(o) 1 *Str.* 80.

(p) 2 *Com. Dig. tit. Baron & Feme*, *V. T. Mitchinson v. Hewson*, 7 *Term Rep.* 348.

(q) *Demftan and wife v. Burwell*, 1 *Wils.* 224. See also 2 *Wils.* 214.

(r) Per Curiam, *Bull.* 21.

(s) *Com. Dig. tit. Baron & Feme*, *V.* 1 *Salk.* 282.

(t) *Yard v. Eland*, 1 *Ld. Raym.* 368 1. *Salk.* 117. *Carth.* 462. *S. C.*

(u) *Cro. Jac.* 77. 205. 1 *Sid.* 25. 2 *Sid.* 128. 1 *Salk.* 114. *Com. Dig. tit. Baron & Feme*, X.

may join, though damages only are recovered : as in *assumpsit* upon an express promise to the wife, after coverture, to pay her 10*l.* in consideration of a cure to be performed by her ; the husband and wife may join, or the husband alone may sue.

So, upon a promise to pay 8*l. per annum* to the husband and wife during coverture, they may join ; or the husband alone may sue. (v)

But when the wife cannot have an action for the same cause, if she survive her husband, the general rule of law is, that the action must be by the husband alone. (w)

As, in an *indebitatus assumpsit* on an implied promise to pay for work done by the wife during coverture ; the law presumes no promise to have been made to the wife ; for she is the servant of her husband ; and he is not only at the charge of the materials to carry on the work, but is also obliged to maintain his wife ; and therefore it is the law considers the promise to have been made to him only. (x)

(v) *Com. Dig. tit. Baron & Feme, X.*

(w) *Com. Dig. tit. Baron & Feme, W.*

(x) 4 *Mod.* 156. 1 *Salk.* 114. 3 *Salk.* 63. *Cartb.* 251. 2 *Mod.* 199, 200.
3 *H. B.* 108.

CHAPTER III.

Of Contracts with Master and Servant.

FROM the relation subsisting between master and servant, the subject of the present chapter may be considered under the following heads:

1. *What Contracts made by a Servant shall bind his Master.*
2. *In what Cases the Master is entitled to the Earnings of his Apprentice or Servant.*
3. *Of the Servant's liability upon his implied Undertaking to serve his Master with Care and Diligence, &c.*
4. *Of the Contract between Master and Servant for Wages; and of the Servant's Right to a Month's Warning, &c.*
5. *Of the Master's liability to provide Medicine, &c. for his Servant in case of Illness.*

1. *What Contracts made by a Servant shall bind the Master.*

In general a master is liable for acts done by his servant in the exercise of his official employment. And the reason of this liability is said (a) to arise from the relation subsisting between master and servant: for, as in strictness, every one ought to transact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another; it is highly reasonable that he should answer for such substitute; and that his acts should be deemed the acts of the principal.

Therefore, where a bailiff or servant hath authority from his master to buy or sell goods, &c. for him, he shall be answerable for the contract made by his bailiff or servant relating to the sale of them. (b)

So, where a servant usually buys for the master upon credit, and the servant buys some things without the master's order, yet if the trader trusted the master he shall be chargeable. (c)

So, in *Sir Robert Wayland's* case, (d) where it was proved, that he used to give his servant money every *Saturday* to defray the charges of the foregoing week, the servant kept the money; yet *per Holt*, Ch. J. "The master is chargeable, for the master at his peril ought to take care what servant he employs; and it is more reasonable, that he should suffer for the cheats of his servant than strangers and tradesmen.

So, in the case of *Hazard v. Treadwell*, (e) where the defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards.

(a) *Bac. Abr. tit. Master and Servant, K.*

(b) *F. N. B.* 120. G. See also *Doñ. and Stud. Dial.* 2. c. 42.

(c) 1 *Show.* 95. 3 *Salk.* 234. *Holt's Rep.* 460.

(d) 3 *Salk.* 234. See also *Rusby v. Scarlett*, 5 *Esp. Rep.* 76. *S. P. et post.* 222.

(e) 1 *Stra.* 506.

He sent the same waterman a second time with ready money, who received the goods, but did not pay for them. It was ruled, that the sending the waterman upon trust the first time and paying for the goods, was giving him credit, so as to charge the defendant upon the second contract.

So, in the case of *Precious v. Abel*, (f) which was an action for work done as a farrier in shoeing and physicking the defendant's horse: the defence was, that the defendant, by an agreement with his groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary. *Ld. Kenyon*, Ch. J. held, that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom. That if the servant buys things which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant.

So, in the case of *Gratland v. Freeman*, (g) which was an action of *assumpsit* for beer sold by the plaintiff, a publican, to the defendant. On the trial it appeared, that the defendant had been in the habit of dealing with the plaintiff upon credit, and had paid him occasionally when the bill amounted to a certain sum. After paying up all arrears, the defendant told the plaintiff's servant, who brought the beer, that he would run up no more bills with the plaintiff, but would pay for the beer as it came in; and the defence was, that he had paid the money to the servant. Lord *Eden*, Ch. J. said, "The defendant must show that the master had notice of this change in the mode of dealing." It was then contended by the counsel for the defendant, that this notice having been given to the plaintiff's servant, and the money having been paid to the servant, the master should be bound by it. But his lordship said, "He thought not." It was a change in the usual mode of dealing suggested by the defendant himself; and as he had personal dealings with the master, in a particular mode, notice to the servant alone of a change in that mode would not be sufficient; the defendant must show that the master himself had notice of it, or he could have no defence to the action." The defendant being unable to establish that fact, the plaintiff recovered the amount of his demand.

(f) 1 *Esp. Rep.* 350. (g) 3 *Esp. Rep.* 85.

But where a man gives his servant money to pay for commodities as he buys them, upon a contract or an understanding between the tradesman and the master to deal for *ready money*; if the servant embezzles the money, the master is not liable.

Thus, in the case of *Stubbing v. Heintz*, (b) which was an action of *assumpsit* for goods sold and delivered. The defendant contracted with the plaintiff to serve him with all kinds of meat at a certain price *per pound* for *ready money*. The cook was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it; in general she paid once a week, on a *Monday* morning; and the defendant always gave the servant the money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the defendant as above stated. At length the defendant got another cook, and gave her money as usual, but she did not pay the bills as the others had done, but suffered them to be in arrear 3*l.* 3*s.* 3*d.* She then ran away from the defendant's house, after which the defendant was called upon, for the first time, to pay this sum of money, and on his refusal the plaintiff brought the present action. The defendant also proved, that when his family were absent from town in the summer, a servant, who was left to take care of the house, had meat for her own support from the plaintiff, and paid him for the same, but he never demanded this sum of money from that servant, or mentioned to her that it was owing to him from the defendant.

Lord *Kenyon*, Ch. J. said, "Nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit. Here the contract between the parties was to deal for ready money: and the plaintiff when he let the bill run on to such an amount, as the sum now claimed, was giving credit to the servant, and not to the defendant. The defendant had not entered into a new contract, but still thought that he was dealing on the same terms as before." A verdict was accordingly found for the defendant.

(b) *Peake's Cas. N. P.* 47. See also 1 *Show. 95. S. P.*

So, in the case of *Pearce v. Rogers*, (i) which was an action brought by the plaintiff, who was a publican, to recover from the defendant the amount of a score for beer, supplied the defendant's family. The defendant dealt with the plaintiff for the porter used in his family, and was in the habit of paying ready money to the plaintiff for a certain quantity of porter which was allowed for the family; and, in fact, though the beer for which the action was brought had been delivered at the defendant's house, it had been carried in clandestinely by the maid servant, for her own use, and that of the defendant's wife's mother; but it did not appear that the plaintiff knew of this circumstance.

Lord *Eldon*, Ch. J. said, "that to allow such a demand would be to put it in the power of servants and tradesmen to ruin the master; that where the master was in the habit of paying ready money for part of the goods furnished, it was sufficient notice to the tradesman that he considered those only as furnished to his family, to put the tradesman on his guard, and to make it incumbent on him to satisfy himself that the goods were really for the use of the master's family; that where the tradesman suffered his goods to be so delivered, and without informing the master, if in point of fact they did not come to his use, he should hold him not to be liable: that in this case, the porter not having been delivered to the defendant's use, there was, in his opinion, no pretext to charge him." The plaintiff was accordingly nonsuited.

So, where a tradesman had had no dealings with the master, but with the coachman, to whom the master gave money monthly for the purpose of buying oats and hay for his horses; and the tradesman made no application to the master for his demand until a year after the goods were delivered, Lord *Kenyon*, Ch. J. ruled, that the master was not liable. (k)

But in the case of *Rusby v. Scarlett*, (l) which was an action brought to recover the price of a quantity of hay and straw sold by the plaintiff, for the use of the defendant's horses. The plaintiff proved the delivery of a quantity of hay and straw at the defendant's stables, and the delivery of bills of parcels; but there was no evidence of his having ever seen the defendant, or of his having ever received any orders from him, or that he ever received from him directly any payment or money whatever.

(i) 3 *Esq. Rep.* 214. (k) *Esq. Ni. Pri.* 115. 3d. ed. (l) 5 *Esq. Rep.* 76.

The defence was, that the defendant had given money to his coachman to pay the bills, which he had embezzled. It appeared that the defendant had kept a book with the servant; in which were entered the articles procured by the servant, and the sums advanced to him; but there did not appear to be any connection between the sums advanced to the servant, and the demands which he was to pay; but the money was advanced generally.

Lord *Ellenborough*, C. J. said, "The general rule to subject the principal to the act of the agent is this. The agency must be antecedently given, or be subsequently adopted. There must, in the latter case, be some act of recognition; but if I authorise a man to obtain credit on my account, and he gets the goods on such credit, unless I have paid him, I am myself liable: but I go further; for if the goods were taken up, and the money given afterwards to the servant to pay, I am inclined to think the master liable, if the servant has not paid over the money; for he has given the servant authority to take up goods on credit. It is therefore material to see when the money was given. If the servant was always in cash before-hand, to pay for the goods, the master is not liable, as he never authorised him to pledge his credit; but if the servant was not so in cash, he gave him a right to take up the goods on credit; and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant, his master."—The jury accordingly found a verdict for the plaintiff.

But where a master forbids a tradesman to deliver any goods except his servant pays for them, and goods are afterwards delivered to the servant upon credit; the master shall not be liable if he has paid the servant the money for them. (m)

So, in the case of *Hiscox v. Greenwood*, (n) which was an action of trover; it appeared, that the plaintiff's chaise having been damaged by the negligence of his servant, and without his knowledge, the servant had, without acquainting his master, taken the chaise to the defendant, who was a coachmaker, to get it repaired: the defendant had never been employed by the plaintiff as his coachmaker, or to do any work for him. Some repairs had been done to it to a very small amount. The defendant refused to deliver it up till he was paid the amount of his demand, contending that he had a lien on the chaise, on account of the work which he

(m) *Brownl.* 64.

(n) 4 *Esp. Rep.* 174.

had done to it. But Lord *Ellenborough*, Ch. J. said, "that the defendant had no right to hold the chaise as a lien. Whatever claim of that sort he might have, he must derive it from legitimate authority: that unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which he had no knowledge, nor to which he gave his assent. It was the duty of the tradesman, when he was employed, to have enquired of the principal if the order was given by his authority; but having neglected to do so here, and the master having never employed him, the master was not liable to the demand; and the detainer of the chaise was unlawful."

2. *In what Cases the Master is entitled to the Earnings of his Apprentice, or Servant.*

Whatever an apprentice earns by his labour, whilst he remains in the actual employ of the master, clearly belongs to the master. So, where an apprentice leaves his master's service, and is employed by a stranger, the master is entitled to his wages or earnings, in respect of such employment during his apprenticeship.

Thus, in the case of *Barber v. Dennis*, (o) where it appeared that the plaintiff had her apprentice taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the plaintiff brought trover. It was agreed the action would well lie, if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master. *Holt*, Ch. J. said, he would understand him an apprentice or servant *de facto*, and that would suffice against the defendant being a wrong doer.

So, in the case of *Eades v. Vandeput*, (p) which was an action against the captain of a ship of war by the master of an apprentice, to recover wages for the service of his apprentice, who, having been impressed, was detained on board the defendant's ship. The only witness to charge the defendant with knowledge was the apprentice boy himself, who swore that after he had been impressed and carried on board the ship, he told the defendant, the

(o) 6 *Mod.* 69. 1 *Salk.* 68. *S. C.*

(p) *Mich.* 25 *Geo.* 3. *B. R.* 5 *East. Rep.* 39. *n. a.*

captain, that he was an apprentice, and required his discharge, which was refused. The *Court* were of opinion that the evidence of the boy was sufficient, and that the captain ought to have made enquiry into the truth of what the boy said; for after that information he detained him at his peril; and it was admitted that if the indentures had been produced, the defendant would have been bound to have discharged the boy.

So, in the case of *Curteis v. Bridges*, (q) it was held, that if the master of one ship takes a servant that belongs to the master of another ship, whatever wages he receives from the *King* upon his account shall be to the use of his first master, being acquired by the labour and industry of his servant.

And by the stat. 2 & 3 Anne, c. 6. s. 17. after reciting, "whereas owners and masters of merchant ships are at great charge in educating and bringing up the parish children, till they come to the age of eighteen years, and other voluntary apprentices three years, at which time they are capable to serve in her Majesty's ships of war; it is enacted, that when such apprentices shall be impressed, or voluntarily enter themselves into her Majesty's service, the said owners or masters of such apprentices their executors, administrators, or assigns, shall be entitled to able seaman's wages for such of their apprentices as shall upon due examination, be found qualified for the same, notwithstanding their indentures of apprenticeship." And by stat. 31 Geo. 2. c. 10. s. 16. it is declared, "that that act, or any thing therein contained, shall not extend to, or be construed to invalidate or make void any indenture whereby any master is or shall be entitled to have or receive the wages, pay, or other allowances of money earned by his apprentice, but the same shall be paid by the *Treasurer of the Navy*, according to such indenture, as has been usual in such cases; unless such apprentice shall be above the age of eighteen years at the time when such indenture was made and executed; or unless such apprentice shall have been hired and rated as a servant to any commission or warrant officer belonging to any of the ships or vessels of his Majesty, such apprenticeship not being then known to such officer; in which case the wages or pay of such servant shall be due and payable to such commissioner, or warrant officer, according to the usual practice of the navy, until such

(q) *Comb.* 450.

“ officer shall be informed of such apprenticeship : and in either
 “ of the cases hereinbefore mentioned, the master of such ap-
 “ prentice shall not be entitled to receive any wages, pay, or al-
 “ lowances, by virtue of any such indenture.”

But though the master is clearly entitled to the earnings of his *apprentice*, it may be doubted whether the same rule applies to the case of *hired servants*. All the cases which occur in the books relate to apprentices only. It is, however, observed, (r) with regard to *hired servants*, that the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract, such a case rather importing the master's right to damages for the injury sustained by the consequences of the second retainer, than a right to the profits accruing from the employment.

3. *Of the Servant's liability for Breach of his implied Undertaking to serve his Master with Diligence and Fidelity, &c.*

Upon every contract of hiring there is an undertaking implied on the part of the servant, that he will serve his master with care, diligence, and fidelity : so that wherever the master sustains an injury by reason of any negligence or misconduct on the part of his servant, the former may maintain an action against the latter, either of *assumpsit*, or on the *case* in *tort* to recover a compensation by way of damages for breach of his duty.

Thus, (s) if A. is employed by B. to sail from *England* to the *Indies*, and A. covenants, that he or his servants will not thence import any callicoets, &c., and A. retains C. as his servant in this voyage, and acquaints him with the covenants, and notwithstanding C. falsely and fraudulently brings thence certain callicoets, &c. A. shall have an action against C., for though no action lies by a master for the bare breach of his command, yet if a servant does any thing falsely and fraudulently, to the damage of his master, an action will lie.

(r) *Co. Lit.* 117. a. n. 1. *Bac. Abr.* 116. *Master and Servant.*
 (s) 1 *Sid.* 298. 18 *Lew.* 188.

So, if a merchant's servant takes his master's goods that are arrived at a port in *England*, and, before payment of the customs, lands them, *per quod* the goods are forfeited and seized by the king; the master may have an action of trespass upon the case against his servant. (t)

So, if a servant drives his master's cart, and by his negligence suffers the cattle to perish, an action upon the case lies against him. (u)

If a man deliver a horse to his servant to go to market, or a bag of money to carry to *London*, which he neglects to do, the master may have an action of *account* or *detinue* against him: or, he might now maintain an action of *assumpsit* for breach of his implied promise. (v)

But if a man delivers money to his servant to carry to such a place, and he is robbed, the servant shall not answer for it; for a servant only undertakes for his diligence and fidelity, and not for the strength and security of his defence, and therefore shall not be obliged to preserve his master's property at all adventures. (w)

4. *Of the Contract between Master and Servant for Wages; and of the Servant's Right to a Month's Warning, &c.*

If a person retains a servant, and agrees to pay him so much by the day, month, or year, the servant may have an action against the master on the contract, or against his executors; ^{and} ~~for~~ every such retainer will be presumed to be in consideration of wages, unless the contrary appears. (x)

So, if a man be retained in *London* to serve beyond sea, he may have an action for his wages in *England*; and lay the venue in any county. (y) *(Action et contractus sunt melius loci)*

Where a person is hired as an assistant, or deputy, to perform the duties of a particular office, at a certain yearly salary, and the principal is afterwards appointed to another situation, and he employs the same person to transact the business of both offices, the

(t) *Cro. Jac.* 265. *Lane* 65.

(u) 7 *H.* 4. 14. *Bro. iis. Action sur. case* 34.

(v) *Vide* 21 *H.* 4. 14. *Moor* 248.

(w) *Bac. Abr. iis. Master and Servant, M.*

(x) *Ibid. H.* (y) *Brownl.* 54.

assistant is not entitled to any increase of salary without some agreement or promise of the principal.

Thus, in the case of *Bell v. Drummond*, executor, &c. (x) which was an action of *assumpsit* for work and labour done and performed by the plaintiff for *Paterfon*, the defendant's testator; it appeared that the testator was clerk to the commissioners of the land-tax, and that the plaintiff had done the business of his office at a salary of 100*l.* a year; that afterwards, on new duties being imposed, the testator was appointed clerk to the commissioners of those duties, and the plaintiff also transacted that business, but no agreement had been made as to any increase of salary, though the labour of the office was considerably increased. It was proved, that the plaintiff having demanded an additional stipend, the testator had desired the witness (as a friend to both parties) to consider what ought to be allowed the plaintiff. That accordingly the witness did proceed to make an estimate; but before he had finally made up his mind the testator died.

Lord *Kenyon*, Ch. J. said, "that had the plaintiff's case rested wholly on the fact of the new duty being imposed upon him, he should not think it such a case as would have entitled him to come into a court of justice for an additional stipend on a *quantum meruit*; if it was, every porter in a shop, or clerk in an office, would, upon an increase of his master's business, be equally entitled to demand an increase of wages. But upon the evidence produced it appeared clearly that the testator himself thought that he ought to pay something, and the only matter in controversy between him and the plaintiff was the *quantum* of the additional allowance." The plaintiff obtained a verdict.

If a slave comes over from the *West Indies*, and continues in the service of his master in *England*, he is not entitled to wages, unless there has been some agreement or contract of service for wages.

Thus, in the case of *Alfred v. Marquis of Fitzjames*, (a) which was an action of *assumpsit* for servant's wages. It appeared in evidence, that the plaintiff came over from *Martinique* with the Dutchess of *Fitzjames*. His father and mother had been slaves on an estate belonging to her in that island. He had entered into her

(x) *Peake's Cas. N. P.* 45.

(a) 3 *Esp. Rep.* 3.

service in *Martinique* before her marriage with the *Marquis*, and continued to serve her after her marriage; and the *Marquis* found him with necessaries of every description. There was no contract for any hiring for wages; but a witness said, that the *Marquis* had been heard to promise to pay him wages.

Lord *Kenyon*, Ch. J. said, "it was his decided opinion that up to the time of the promise to pay wages, which the witness had said the defendant had made, the plaintiff had no title to recover, as there was no original contract of service for wages."

A contract to pay a certain sum *per annum*, in consideration of services to be performed, is an entire contract for a year, and without a full year's service, the servant is not entitled to any part of his salary.

Thus, in the case of *The Countess of Plymouth, v. Trogmorton*, (b) which was an action of debt, wherein the plaintiff declared upon a writing, whereby the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 1*col.* *per annum* for his service, and shows that the defendant's testator died three-quarters of a year after, during which time he served him, and demands 75*l.* for the three-quarters; judgment for the plaintiff in C. B. by *nil dicit*. But upon error brought in K. B. the judgment was reversed; it being held, that without a full year's service nothing could be due, and that it was in nature of a condition precedent.

But with regard to the common case of an hired servant, it is said, (c) that such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year.

So, if a master turns away his servant without a previous notice or warning, (except for misconduct) the servant is entitled to a month's wages.

(b) 1 *Salk.* 65. 3 *Mod.* 153. *S. C.* See also 6 *Term Rep.* 320 *S. P.* 3 *Vin. Abr.* tit. Apportionment, fo. 8.

(c) Per *Lawrence*, Just. 6. *Term Rep.* 3. 6.

Thus, in the case of *Robinson v. Hendman*, (d) which was an action of assumpsit brought by the plaintiff to recover the amount of a month's wages, on the ground of his having been discharged by the defendant, without any notice or warning. No agreement was proved to the effect of the claim; but general usage only was relied on. The defendant proved that the plaintiff was negligent in his conduct, frequently absent when his master wanted him, and often slept out.

Lord *Kenyon*, Ch. J. said, "that though in the present case he thought the plaintiff was not entitled to recover, on account of his misconduct, he was of opinion, that if a master turned away his servant without warning, or previous notice, and there was no fault or misconduct in the servant to warrant it, he ought to have the allowance claimed, of a month's wages; which he thought reasonable."

5. *Of the Master's liability to provide Medicine, &c.
for his Servant in Case of Illness.*

Different opinions have been held upon this subject; and but three cases appear in print. In two of them it was determined that a master is not bound to provide medical attendance, &c. for his servant, who meets with an accident in his master's service. In the other, which was tried before Lord *Kenyon*, Ch. J. it was ruled, that a master was liable for medicines furnished to his servant whilst in his service. The two former cases, it should be observed, were argued and determined in the courts of *Westminster-Hall*; the latter was only a determination at *nisi prius*. I shall, however, present them to the reader in the order in which they were determined.

The first is *Newby v. Wiltshire*, (e) which was *assumpsit* for money paid, laid out, and expended for the defendant's use. The case for the opinion of the court stated, that the defendant, a farmer, sent his waggon, in May 1784, to *Cambridge*; and in returning, a boy that had been sent with it fell from the shafts and broke his leg; that the boy could not be removed out of the parish where the accident happened, on account of the danger it might occasion:

(d) 3 *Esp. Rep.* 235.

(e) *East Term Rep.* 25 G. 3. K. B. 3 *Esp. Rep.* 739.

that the plaintiff was overseer of the parish where the accident happened, and took the charge of getting the boy cured upon himself: that it was necessary to cut off the leg; and the overseer expended, in and about the cure, 32*l.*: that afterwards the boy served the remainder of the year with his master; and the action was brought to recover from the defendant the expences of the boy's cure.

Lord *Mansfield*, Ch. J. said, "I don't applaud the humanity of the master in this case; he does not enquire after his servant for six weeks after the accident; and when he does, "he passes by on the other side." I think in general, a master ought to maintain his servants, and take care of them in sickness; but the question now is, what is the law? There is, in point of law, no action against the master to compel him to repay the parish for the cure of his servant: no authority whatsoever has been cited; and it seems to me that it cannot be. The parish is bound to take care of accidents; they do their duty in that respect: therefore I am inclined to think that the plaintiff cannot recover." The other Judges concurred in this opinion, and the Court gave judgment for the defendant.

The second reported case on this subject, is, *Scarman v. Castell*, (f) which was an action to recover the amount of an apothecary's bill for medicines furnished to, and attendance on a servant of the defendant, while living under his roof. The plaintiff an apothecary, attended the servant in the house of the defendant, who was a man of large fortune, but it was not proved that the plaintiff was expressly employed by the defendant; and therefore it was contended that the plaintiff could not recover against the master. But Lord *Kenyon*, Ch. J. said, "that he was of opinion that a master was obliged to provide for his servant in sickness and in health, and that he, therefore, was liable for medicines furnished to his servant, while in his service. Not that his servant was at liberty to go abroad and contract debts for medicines, but that while he was under his master's roof, the master was under a legal, as well as a moral obligation, to provide the necessary medicines, and to pay for such as were administered to his servant under such circumstances." The counsel for the defendant then cited the case of

(f) *Sittings at Westm. after Hil. Term 35 G. 3. K. B. Coram Ld. Kenyon, Ch. J. 1 Esp. Rep. 270. and cited in 3 Bos. and Pul. 248.*

Newby v. Wilshire ; but it was answered by the plaintiff's counsel that the case cited was of a servant in husbandry. Lord *Kenyon* said, that that case was distinguishable from the present. He therefore directed the jury to find a verdict for the plaintiff, which they did to the full amount of the plaintiff's bill.

But, in the case of *Wennall v. Adney*, (g) which was also an action of *assumpsit* to recover the amount of a surgeon's bill. The cause was tried before *Le Blanc*, J. at *Shrewsbury* assizes, when it appeared that the action was brought to recover 8*l.* 18*s.* 6*d.*, the amount of a bill for medical attendance upon a servant of the defendant, who had his arm broken while driving the defendant's team, and who had been hired by the defendant, at the yearly wages of 3*l.* 10*s.* and victuals ; that the accident happened nearer the house of the servant's mother, than that of the defendant, and that he was taken to his mother's house ; that the accident happened in one parish, that the house of the servant's mother was situated in another, and the defendant's in a third ; that the plaintiff, who was the surgeon usually employed by the defendant, accidentally passing near the mother's house, was called in, and desired to attend her son ; at which time nothing was said about the defendant paying for his attendance, but the mother observed that she had always been able to pay her way, and hoped she should do so still ; that during the time of the servant's confinement he was supplied with victuals from the defendant's house ; that the plaintiff first delivered his bill to the defendant, but afterwards called a meeting of the parishioners of the parish in which the mother's house was situated, and submitted it to them for payment, who refused to discharge it. The learned Judge being of opinion that the defendant, not having employed the plaintiff, or made any promise of payment, was not liable, nonsuited the plaintiff. The case afterwards came before the Court of Common Pleas upon a motion to set aside the nonsuit ; and, after argument, the Judges delivered their opinions *seriatim*.

Lord *Alvanley*, Ch. J. "I have reason to believe that the opinion delivered by Lord *Kenyon*, in the case of *Scarman v. Costell*, was not a hasty opinion, but formed upon reflection. I have no difficulty, however, in saying, that I concur with the learned judge before whom this cause was tried, in thinking that the defendant is not liable. The sum in dispute is only 8*l.* 18*s.* 6*d.*, and if a wish

is entertained by those whom this judgment may affect, to obtain a more solemn decision upon this point, some opportunity should be taken where a greater stake is in litigation. In this kind of question much may depend upon the nature of the contract entered into between the master and the servant. Sometimes a master engages to supply his servant with necessary victuals, and it may be undoubtedly argued, that necessary victuals mean such victuals as may suit the state of health or infirmity in which the servant happens to be; as if a servant be in need of wine, or victuals of that description, which are given by way of medicine. It is sufficient, however, to observe, that previous to the case of *Scarman v. Castell*, there is no authority in the law of *England* to be found which warrants the position contended for on the part of the plaintiff. I have no doubt whatever that parish officers are bound to assist where such accidents as these take place; and that the law will so far raise an implied contract against them as to enable any person who affords that immediate assistance, which the necessity of the case usually requires, to recover against them the amount of money expended."

Heath, J. "I believe that the humanity of Lord *Kenyon* misled him when he adopted the doctrine upon which he decided the case of *Scarman v. Castell*. Probably at the moment it occurred to him that if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute; but I am perfectly sure it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers rather than against their masters; for the situation of many masters who are obliged to keep servants is not such as to enable them to afford sufficient assistance in cases of serious illness."

The other judges delivered their opinions to the same effect; and the rule for setting aside the nonsuit was discharged.

CHAPTER IV.

Of Principal, Factor, and Agent.

A FACTOR, in commerce, is an agent or broker employed by merchants to buy or sell goods, or negotiate bills, or transact any kind of business on their account; and for which he is entitled to a certain commission or allowance. (a)

The general duty of a factor or agent is to procure the best intelligence of the state of trade at his place of residence; of the course of exchange; of the quantity and quality of goods at market, their present price, and the probability that it may rise or fall; to pay exact obedience to the orders of his employers; to consult their advantage in matters referred to his direction; to execute their business with all the dispatch that circumstances will admit; to be early in his intelligence, distinct in his accounts, and punctual in his correspondence. (b)

(a) *Vide* Mal. lex mer. 81. Beawes lex mer. 45. (b) *Ibid.*

It is intended to consider the subject of this chapter in the following order :

1. *Of the general and limited Power of a Factor or Agent; and of Contracts, &c. made by him on Account of his Principal.*
2. *Of Payment to, or Settlement with a Factor or Agent.*
3. *In what Cases a Factor or Agent may sue or be sued upon Contracts made by him on account of his Principal.*
4. *Of Sales, &c. on Del credere Commission.*
5. *Of Sales, &c. by Auctioneers.*
6. *Of Contracts and Agreements by Principal, Factor, and Agent Inter se; and of their respective Rights and Remedies : And,*
 1. *Of a Factor or Agent's liability on a Promise to indemnify his Principal upon a Re-sale of Goods, &c.*
 2. *Of the Remedy against a Factor or Agent for not accounting, and for Negligence, &c.*
 3. *Of the Factor or Agent's Right of Lien on the Goods, &c. of his Principal.*
 4. *In what Cases a Factor or Agent is not entitled to recover for Commission, or Money paid, &c.*

1. *Of the general and limited Power of a Factor or Agent; and of Contracts, &c. made by him on Account of his Principal.*

A factor or agent's power is either general or limited. If he be entrusted with a general power, he must exercise a sound and honest judgment in those matters which are left to his discretion: for he will not be justified in taking unreasonable or unusual measures, or doing any thing contrary to the interest of his principal. If, however, his proceedings are challenged, the principal must prove, that he might have done better, and was guilty of wilful mismanagement.

When a factor or agent's power is limited, he must strictly adhere to his orders, which should always be given in writing. If he exceeds his power, though with a view to his employer's interest, he will be liable for the consequences. For example, if he gives credit, when none ought to be given, or longer credit than directed, for the sake of a better price; and the buyer becomes insolvent, he shall be answerable for the debt. (c)

A factor or agent acting under a general power, may sell on credit; particularly if the goods consigned be generally sold on credit at the place of consignment; unless, indeed, he be expressly restricted by the terms of his commission not to give credit. (d) He should, however, be careful to enquire into the solvency and circumstances of the person to be trusted.

Although opinion will never justify the factor for acting contrary to orders, necessity sometimes will. As, if he be limited to sell goods at a fixed price; and the goods be perishable, and not in a condition to be kept, and the factor has no time or opportunity for consulting with the principal, it is apprehended he may sell them for ready money under the price limited, in order to prevent a total loss. (e) But in such case it would be advisable to call in

(c) *Vide* Mal. lex mer. 81. and *Sadock v. Burton*. *Yelv.* 202.

(d) 2 *Ch. Cas.* 7. *Mal. lex mer.* 83 *Willes Rep.* 406. 3 *Bos. and Pul.* 489. *But see* 1 *Bul.* 104. *Cas. K. B.* 5. 4. 2 *Mod.* 100. 12 *Mod.* 513, 515. *contra.*

(e) *But see* 2 *Mod.* 100.

two sworn brokers, or other competent persons to examine the commodity.

A factor or agent cannot delegate his power to another without an express authority from his principal for that purpose. (f) And in the execution of the power given to a factor or agent, all contracts, and other acts should be expressed to be made and done by him in the name and on the account of his principal; otherwise the principal may not in all cases be bound by them, and in that event the factor or agent would be *personally* liable. (g)

A factor or agent who has power to sell the goods of his principal cannot bind or affect the property of them by *tortiously* pledging, or otherwise disposing of them, either by way of security for, or in satisfaction of his own debt. (h)

And where goods are thus pledged, or disposed of, the principal may recover them back by action of trover against the pawnee, without tendering to the factor or agent what may be due to him, ~~or~~ without any tender to the pawnee of the sum for which the goods are pledged. And it is no excuse that the ~~factor~~ ^{pawnee} was wholly ignorant that ~~the factor~~ held the goods as a mere factor or agent. (i)

^{it seems that -} But a factor who has a lien on the goods of his principal may deliver them over to a third person, as a security to the extent of his lien, with notice of his lien, and may appoint such third person as his servant to keep possession of the goods for him. And in that case the principal must tender the amount of the lien due to the factor before he can be entitled to recover back the goods so pledged. (k)

If goods are consigned to a factor or agent who afterwards becomes bankrupt; and the goods remain in specie in his hands at

(f) *Burb.* 166.

(g) *Vide* 9 Co. 76. b. *Rol. Abr.* 330. *F. l. 1. Cas. Temp. Hardw.* 1. 2 *Stra.* 705. 955. 1. *Term Rep.* 181. 6 *Term Rep.* 176, 7. *Com. Dig. tit. Attorney C.* 14.

(h) *Vide the cases of* *Paterfon v. Tash*, *Stra.* 1178. *Maans v. Henderson*, 1 *East Rep.* 337 *Newson and another v. Thornton*, 6 *East Rep.* 17. *McCombie v. Davies*, *Id.* 528.

(i) *McCombie v. Davies*, 7 *East Rep.* 5. *See also Hartop v. Hoare*, *Stra.* 1187. *Daubigny v. Duval*, 5 *Term Rep.* 604.

(k) *Vide* *McCombie v. Davies*, 7 *East Rep.* 7. *Per Lord Ellenborough*, *Ch. J.*

the time of such bankruptcy, the principal may recover them from the assignees by action of *trover*? or, if the factor sells the goods, and his assignees afterwards receive the money, the principal may recover it from them in an action of *assumpsit* for money had and received. (l) So, where the factor on such a sale takes notes in payment from the vendee, payable at a future day, and his assignees afterwards receive the money, the principal may recover it from them in the same form of action. (m)

So, bills remitted to a factor, or banker, while unpaid, are in the nature of goods unfold; and if the factor become bankrupt they must be returned to the principal, subject to such lien as the factor may have thereon. (n)

Retention But if goods be consigned to a factor for sale, and he sell, and receive the money for them before his bankruptcy, and do not purchase with the money any specific thing capable of being distinguished from the rest of his property, the principal cannot recover the whole amount from the assignees, but must come in under the commission. (o)

It hath also been ruled in equity, (p) that if one employs a factor, and intrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factors; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c. for as money has no eat-mark, equity cannot follow that in behalf of him who employed the factor.

But if A. employs B. as his factor, to sell cloth and B. sells the cloth on credit and before the money is paid, B. dies indebted by speciality more than his assets will pay; this money shall be paid to A. and not to the administrator of B. as part of his assets, but thereout must be deducted what was due to B. for commission; for a factor is in nature only of a trustee for his principal. (q)

(l) *Scott v. Surman*, *Willes Rep.* 400. See also 6 *East Rep.* 26. in *notis.*

(m) *Willes Rep.* 406.

(n) *Zinck v. Walker*, 2 *Bl. Rep.* 1154. See also *Co. Btpt. Laws*, Chap. 8, f. 15.

(o) *Scott v. Surman*, *Willes Rep.* 400.

(p) *Whitcomb v. Jacob*, 1 *Salk.* 160.

(q) *Burdett v. Willett*, 2 *Vern.* 638.

I now proceed to show what contracts and other acts of a factor or agent will bind his principal.

In the case of *Bolton v. Hillierden*, (r) which was an action of *assumpsit* upon a promissory note. The defendant being a merchant, his apprentice delivered a note to the plaintiff, obliging his master to pay 100*l.* to the plaintiff, or his order. Upon the trial it was proved, that the apprentice had once given such a note to another person for money received of him by the apprentice, which money was applied to the master's use, and that the money due on that note had been recovered of the master. The defendant proved that he did not trust his apprentice to give such notes; and the apprentice himself swore, that he had lost 100*l.* of his master's money at play, and that the day following a foreign bill was drawn upon his master, which he could not pay; therefore he resorted to the plaintiff, with whom the defendant usually had dealings: and because the person who brought the foreign bill would not receive guineas, being the only money he had, he persuaded the plaintiff to receive the guineas, and pay the bill, which the plaintiff did: and that the apprentice gave this note to the plaintiff for money received of him to pay the 100*l.* which he had lost at gaming.

Holt, Ch. J. said, "If a master has never entrusted a servant to charge him by signing of notes in the master's name; yet if the money for which such note is signed comes to the use of the master; or if in this present case the servant gave the note to raise money to pay the foreign bill charged to his master, which is for the benefit of his master; such note will bind the master, though he never permitted the servant to sign such notes before. But if in this case the note was given for the money which the apprentice had lost at gaming, and which did not come to the master's use, the master ought not to be bound by it." The jury gave a verdict for the plaintiff, which *Holt* well approved.

So, where a servant having power to draw bills of exchange in his master's name, is afterwards turned out of the service. *Holt*, Ch. J. held, (s) that if he draws a bill in so little time after that the world cannot take notice of his being out of service; or if he were a long time out of his master's service, but that kept so secret, that

(r) 1 *Ld. Raym.* 224. 3 *Salk.* 234. S. C.

(s) *Holt. Rep.* 460. See also *Bac. Abr. tit. Master and Servant, K.*

the world cannot take notice of it, the bill in those cases shall bind the master.

But with respect to the extent of an agent's power there is a wide distinction between *general* and *particular* agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent, constituted so for a particular purpose and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority.

Thus, in the case of *Fenn* and another v. *Harrison* and others, (1) where it appeared, that a bill of exchange was drawn by *Livesey* and Co. on *Gibson* and *Johnson* in favour of one *Norman*, which came by indorsement to the defendants; who, being desirous of getting it discounted, employed *Francis Huet* for that purpose, telling him to carry it to market and get cash for it, but that they would not indorse it. *F. Huet* applied to his brother *James Huet* to get the bill discounted, informing him that it was the defendants' bill, and that though they did not chuse to indorse it, yet he added (as a reason of his own) that, as their number was on the bill, it was equivalent to an indorsement; and that he (*F. Huet*) would indemnify him if he indorsed the bill. On an application by *James Huet* to the plaintiffs, and on his indorsing the bill, without which indorsement he could not have got the bill discounted, the plaintiffs discounted it; chiefly relying on the credit of *Gibson* and *Johnson*, for at that time they did not know that the defendants had had any concern with the bill. Afterwards, however, on the failure of *Gibson* and *Johnson*, the plaintiffs having heard that the bill had passed through the defendants' hands, applied to them for payment, who at first refused, but afterwards promised to take it up; and, on their not doing so, this action was brought to recover the amount of it. On these facts the court held, that *F. Huet* was a *special agent* under a limited authority, and as he was expressly directed by the defendants not to indorse the bill, but merely to carry it to market and get cash for it, he could not bind his principals (the defendants) by any act beyond the scope of such limited authority. And that the defendants were neither liable on account of the indorsement made by *James*

(1) 3 Term Rep. 757.

Huet, nor on their subsequent promise to pay, because not being under any obligation, it was *nudum pactum*.

But, the court granted a new trial ; and upon the second trial it appeared in evidence, that the defendants, when they desired *F. Huet* to get the bill discounted, *did not say that they would not indorse it*. The court, (v) on these facts being stated, were unanimously of opinion, that the plaintiffs ought to recover the amount of the bill, on the ground that as the defendants had authorized *F. Huet* to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts ; and that, if it were doubtful from the conversation, their subsequent conduct in promising to pay the bill, was decisive. But *Ashburst, Buller, and Grose*, Justices, said, that unless the evidence on this trial had varied from that given before, they should have continued to entertain the same opinion which they delivered on the former occasion.

So, in the case of the *East India Company v. Hensley*, (u) which was an action on the case to recover damages for the loss arising from the re-sale of a certain quantity of raw silk sold by the company at one of their sales to the defendant. The silk had been bought by one *Briggs*, a broker, for the defendant, and the defence set up by the defendant was, that his orders to *Briggs* were to buy the best *Bengal* raw silk, whereas this was not raw silk, nor of the best quality.

Lord *Kenyon*, took the distinction between a *general* and *special* agent ; “ that in the first case the principal must be bound by all his acts, whereas in the latter, he is only bound, while the agent acts within the scope of his authority, and that if in the present case the defendant could prove that he had so specially authorized *Briggs* to bid for him for best *Bengal* silk, and this turned out to be not of that description, that he should not be bound by his contract so made without his authority ; but that *Briggs* should be liable to an action at the suit of the Company for his abuse of it.”

But though a *special* agent, acting under a limited authority, cannot bind his principal if he exceed his authority ; yet if, upon

(v) 4 Term Rep. 177. (u) 1 Esp. Rep. 111.

the purchase of goods, an agent has any discretion given him to exceed the sum ordered to be paid, the principal is bound by the contract of his agent, even if it should exceed that sum; for by giving him a power to exercise his discretion he cannot be considered as a special agent. (w)

Where an agent is employed to buy goods, his acknowledgment of having received them, is evidence against his principal of a delivery to him. (x)

An agent of a regiment is but a servant of the colonel, and the receipt of the agent charges the colonel. There is no privity between the king, or the soldier, and the agent. (y)

A principal is, in general, responsible for the misrepresentation and deceit of his factor or agent. As, in the case of *Hern v. Nichols*, (z) which was an action on the case for a deceit, the plaintiff set forth, that he bought several parcels of silk for ——— silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it to him for ——— silk. On the trial, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea: And the doubt was, if this deceit could charge the merchant? *Holt*, C. J. was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter* yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a trust and confidence in the deceiver should be a loser than a stranger: And upon this opinion the plaintiff had a verdict.

But it is said, * “If a servant selleth a horse with warranty, it is the sale and contract of the master, but it is the warranty of the servant, unless the master giveth him authority to warrant it, for a warranty is void which is not made and annexed to the contract; but there it is the warranty of the servant, and the contract of the master: but if the master do agree unto it after, it shall be said that he did agree to it *ab initio*.” Mr. Justice *Asheburst*, (a) how-

(w) *Hicks v. Hankin*, 4 *Esp. Rep.* 114.

(x) Per *Buller*, *Just.*

3 *Term Rep.* 454.

(y) Per *Holt*, *Ch. J.* 1 *Ld. Raym.* 101.

(z) 1 *Salk.* 289. *Holt* 462. *S. C.* See also 1 *Term Rep.* 12. *Park. on Insurance*, Chap. 10.

* Per *Doddridge*, *Just. Gobd.* 361.

(a) 3 *Term Rep.* 760. See also the case of *Helyear v. Hawke*, 5 *Esp. Rep.* 72.

ever, in commenting upon the above *dictum* makes this distinction, namely, that if a person keeping livery stables, and having a horse to sell, directs his servant not to warrant him, and the servant does nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant: but if the owner of the horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse; and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment.

2. *Of Payment to, or Settlement with a Factor or Agent.*

A purchaser of goods from a factor or agent has a right to pay him the money for them; and his receipt will be a sufficient discharge. (b) But if the principal forbids the vendee of goods to pay the value to the factor, the vendee would not be justified in afterwards paying the money to the factor. For a factor's sale, by the general rule of law, creates a contract between the owner and the buyer, which entitles the former to call upon the latter for payment at any time before the money is paid over to the factor: and it is the same notwithstanding the factor acts upon a *del credere* commission. (c)

But if the factor at the time of the sale agree to set off a debt of his own due to the vendee, it is binding upon the principal, and considered the same as if the factor received so much money from the vendee. (d)

So, where a factor, who sells goods under a *del credere* commission, sell them as his own, and the buyer knows nothing of the principal, the buyer may set off any demand he may have on the factor against the demand of the principal. (e)

(b) *Cowp.* 256. (c) 2 *Stra.* 1182. *Cowp.* 255. *Co. Bkpt. laws.* Chap. 8. s. 15. But see *Bul. N. P.* 130. (d) *Willes Rep.* 400.

(e) *George v Clagett*, 7 *Term Rep.* 359. See also *Rabone v. Williams*, 11. 360. in *notis*, *S. P.*

Payment of a debt to an agent, (who is an attorney residing in the country, and employed by the plaintiff's attorney, living in London, to sue a debtor, resident in the country) is not a valid payment to the plaintiff; but if made to his own attorney it would be a good payment. (f)

If a master sends his servant to receive money owing to him, and the servant instead of taking money, receives a bill, and the master, on being told of it, disavows, he is not bound by this payment; but acquiescence, or any thing tantamount will be proof of the master's consent; and will make the act of the servant the act of the master.

Thus, in the case of *Ward v. Evans*, (g) which was an action for money had and received, &c. The facts found by the jury were, that one *Fellows*, a merchant, who kept his cash with the defendant, a goldsmith in *Lombard-Street*, was indebted to the plaintiff in 60*l.* 10*s.* the plaintiff sent his servant to receive the money of *Fellows*, who ordered his servant to pay the plaintiff's man the money at the defendant's. Accordingly both the servants went to the defendant's shop, and there the defendant's servant was directed to pay the 60*l.* 10*s.* which he accordingly did by giving the plaintiff 10*s.* in cash, and a note subscribed by one *Wallis*, a goldsmith, for 60*l.* payable to one *Freeman*, or bearer, which the plaintiff's servant accepted. This transaction was about noon, and at that time *Wallis* was a solvent person, and continued paying his bills till night. Next morning the plaintiff's servant coming with the note to receive the 60*l.* of *Wallis*, found that he had stopped payment and was become insolvent. It did not appear that the plaintiff was consensual of, or privy to this transaction of his servant, or had given him any authority to receive a note instead of money, or approved of it afterwards.

The Court held, "That when a servant is sent to receive money on a bill, he cannot accept a note instead of money without the particular directions of his master; and therefore the delivery and acceptance of *Wallis's* note was no payment: But if the master afterwards assents to this mode of payment, it amounts to a pre-

(f) *Yates v. Freckleton*, Dougl. 623. (g) 2 *L.d. Raym.* 928. *Com. Rep.* 139. 6 *Mod.* 36 *et vide* *Thorold v. Smith*, Holt *Rep.* 464. 8. *P.*

vious command. The taking, therefore, of such a note is no payment; for it is always a conditional acceptance, and so understood not to be a discharge till paid. But still the money ought to be demanded in convenient time, for if the party keep the note by him without demanding it, he must run the hazard of it; but here it was demanded in due time." Judgment for the plaintiff.

In the case of *Nichson v. Broban*, (b) it appeared that the plaintiff sent his servant, who was accustomed to transact his business for him, on Saturday morning, with a note drawn upon Sir Stephen Evans, with orders to get from him either bank bills or money, and turn them into Exchequer notes; but the servant having other business of his master upon his hands, to save himself the time and trouble of going to Sir Stephen, went to the defendant and prevailed on him to give him a bank bill for the note upon Sir Stephen; and then in pursuance of his master's orders, invested it in Exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir Stephen. On the Monday following Sir Stephen Evans failed; and the question was, upon whom this loss should fall.

Parker, Ch. J. who tried the cause, was first of opinion that the loss should fall upon the defendant, because the servant acted contrary to his master's orders, and the defendant by furnishing the servant with a bank bill, did the master no service at all; and if he had not done it, the servant must in obedience to his master's orders have gone himself and received the money from Sir Stephen. But the Court, after argument, were all of opinion, "That the loss ought to fall upon the master alone; for a servant by transacting the affairs of his master does thereby derive a general authority and credit from him; and if this general authority should be liable to be determined for a time, by any particular instructions or orders, to which none but the master and servant are privy, there would be an end of all dealing but with the master."

So, if a son having a general authority to receive and pay money for his father, receive money due on a bill to his father, and give a receipt for it, as money had to his father's use, and afterwards gives it away, the father can only recover it back from the donee; for his son's receipt is a good discharge of the debt, and therefore

(b) 10 Mod. 109.

his possession is the possession of the father; the son being for this purpose his servant. (i)

So, if A. usually receive the rents of the lord of a manor, if one of his tenants pay his rent to A. this is good payment to the lord. (k)

Where a person takes the security of an agent, *unknown to the principal*, and give the agent a receipt as for the money due from the principal; in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged although the security fail, if he can show that he was injured by means of such receipt, and the omission of the party to inform him of the truth in due time.

Thus, in the case of *Wyatt v. the Marquis of Hertford*, (l) which was an action of *assumpsit* for work and labour. The facts were, that the plaintiff, who had been employed to do certain work for the defendant, after its completion sent in the amount of his demand to the Marquis's steward, who thereupon gave him his own draft on a banker, and the plaintiff gave him in return a receipt for the money on account of the defendant. The draft was dishonoured, and returned to the steward by the plaintiff, who accepted another draft from him for the amount, payable 21 days after date, without making any representation of the matter to the defendant. The second draft was also refused payment; and the steward becoming insolvent, application was then made to the defendant, who resisted payment, on the ground, that the steward had more than sufficient funds of the defendant's in his hands at the time of giving the first draft to have satisfied the plaintiff's demand, and had gone away much in arrear to the defendant on the balance of his accounts. A verdict was given for the defendant. But, upon a motion for a new trial, Lord *Ellenborough*, Ch. J. said, "That there must be a new trial; for on revising his note of the evidence, it did not appear that the defendant was in any way prejudiced by his steward having given his own security to the plaintiff, and taken the latter's receipt. That if it had appeared that the defendant had in the interval inspected the steward's accounts, and had in any manner dealt differently with him on the supposition, that this demand had been satisfied as the receipt im-

(i) 1 *Salk* 289. *Bul. N. P.* 35.

(k) Per *Powys*, *Just. Hol.* 462.

(l) 3 *East*, 147.

ported, no doubt the defendant would have been discharged; for it was clear that the steward had sufficient money of the defendant's in his hands to answer the demand."

3. *In what Cases a Factor, or Agent, may sue, or be sued upon Contracts, &c. made with him on Account of his Principal.*

Where a factor to one beyond sea buys or sells goods for his principal, he may sue or be sued in his own name; for the credit will be presumed to be given to him in the first case; and in the last, the promise will be presumed to be made to him; and the rather so, as it is so much for the benefit of trade. (m)

It has also been determined, (n) "that a factor, having money due to him from his principal, who receives cloths, and is authorised to sell them in his own name, but makes the buyer debtor to himself, though he is not answerable for the debts, yet he has a right to receive the money: his receipt is a discharge to the buyer; and he has a right to bring an action against him to compel the payment; and it would be no defence for the buyer in that action to say, that, as between him and the principal, he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that but where the factor has nothing due to him." And in the same case, it was observed by Lord Mansfield, "that there is no case in law or equity, where a factor having money due to him to the amount of the debt in dispute, was ever prevented from taking money for cloths in his hands."

So, a broker, who has advanced money on goods, may declare on a contract respecting the sale of them in his own name, though in the sale-note the name of the principal is inserted.

Thus, in the case of *Atkyns and Another v. Amber*, (o) where the declaration stated, "That, in consideration the plaintiffs would sell to the defendant a cargo of *Musiel* timber, the defendant undertook to pay them with a bill at two months, the amount of the

(m) *Gonzales v. Sladen*. *Salk. M. S. S. Bul. N. P.* 130. *Bac. Abr. tit. Merchant and Merchandise* B.

(n) *Per Curiam in Drinkwater v. Goodwin*. *Cowp.* 255. See also *Loft.* 331. *S. P.*

(o) 2 *Esq. Rep.* 493.

value of the timber. It then averred the delivery of the timber, and assigned a breach in the not giving the bill as agreed." On the trial before *Eyre*, Ch. J. it appeared, that one *Hippius*, a timber merchant, had employed the plaintiffs as his brokers; and that they were in the habit of advancing him money on the credit of the cargoes he expected to arrive. On the 2d December 1795, *Hippius* was in the plaintiffs' debt; and he, having occasion for further assistance, applied to them to advance him 54*ol.* which they did accordingly by accepting two bills to that amount. *Hippius* then gave them a written authority to dispose of a cargo of timber of his on board the *Salis*, on account of their engagements for him. This timber was afterwards sold by the plaintiffs to the defendant; and the sale-note was, "of so much timber sold by the plaintiffs, on account of J. G. *Hippius*; bill at two months."

On the part of the defendant it was contended, that there was a variance between the contract stated in the declaration, and the one given in evidence; and that therefore the plaintiffs ought to be nonsuited,

Eyre, Ch. J. said, "The sale-note appears to be a sale by *Hippius*; and if it could be proved that, by supposing the contract to be with *Hippius*, the defendant suffered, the defendant should be at liberty to set up that sale against the plaintiffs: but no such thing is alleged. It is proved that the plaintiffs had at least a special property in the timber; the sale was therefore theirs, and I am of opinion it is not a variance."

So, in the case of *Banfill v. Leigh and Another*, (p) where A. and B. assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same, under which the plaintiff submitted to arbitration the matters in difference subsisting between his principals and the defendants; and the plaintiff and defendants mutually promised to perform the award. The arbitrator awarded a sum of money to be paid by the defendants to the plaintiff as such attorney, and the action was brought in his name for the recovery of that sum. The Court held, that the action was well brought in the name of the plaintiff.

An agent is not liable to be sued upon contracts made by him on behalf of his principal, if the name of the principal is disclosed

and made known to the person contracted with, at the time of entering into the contract.

Thus, in the case of *Owen v. Gooch*, (q) which was an action of *assumpsit* for work and labour, and goods sold and delivered. The defence relied upon was, that though the work had been ordered by the defendant, yet that it had not been ordered for himself, but for a person of the name of *Tippell*, and had been done at *Tippell's* house at *Walthamstow*; and that the plaintiff, at the time of the order, was informed that the work was on *Tippell's* account: and the entry in the plaintiff's book was, "Mr. *Tippell*, by the order of *Gooch*."

The counsel for the plaintiff contended that the name of *Tippell* being prefixed to the order, was by no means a proof that the credit was given to him, but was merely identifying the order; that *Tippell* might be a person totally unknown to the plaintiff, but to whom *Gooch*, the defendant, was certainly known; so that the goods must be deemed to be ordered on *Gooch's* credit.

For the defendant it was insisted that *Gooch* by the order appeared to be only the agent, and the goods to have been furnished on *Tippell's* account.

Lord *Kenyon*, Ch. J. "The goods are ordered by *Gooch*, but at the time it is not pretended that they were for his own use; they were ordered for *Tippell*, and the entry is made in his name. We must keep distinct the cases of orders given by the parties themselves, and by others, as their agents. If the mere act of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though in fact they are for another, if the tradesman was not informed at the time that they were for the use of another, he who ordered them is certainly liable; for the tradesman must be presumed to have looked to his credit only. So, if they were ordered for another person, and the tradesman refuses to deliver them but on the credit of the person who orders them, there is then no pretext for charging such third person: or, if goods are ordered to be delivered on account of another, and, after delivery, the person who gave the order refuses to inform the tradesman who the person is, in order that he may sue him; under such cir-

circumstances he is himself liable : but wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable. In this case, *Owen*, (the plaintiff) was informed of all the circumstances that *Gooch* was giving the order for *Tippell*; the goods are sent to *Tippell*'s house, and the entry made in his name. I think there is no colour for making *Gooch* the debtor."

So, where money is paid by mistake to an agent for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it; because it is just that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to loose, he should not be a gainer by the mistake: and therefore, if, after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake, and gives him notice not to pay it over to his principal; the agent cannot afterwards pay it to his principal, without making himself liable to the real owner for the amount. (r)

The mere circumstance of passing such money in *account*, or *making rest*, without any new credit given, fresh bills accepted, or further sum advanced for the principal, in consequence of it, is not equivalent to the payment of it over to the principal.

Thus, in the case of *Buller v. Harrison*, (s) which was an action for money had and received, brought by the plaintiff against the defendant, to recover back a sum of 2100*l.* paid him as due upon a policy of insurance, as *agent* for the assured Messrs. *Ludlow* and *Shaw*, resident at *New-York*. This sum the plaintiff had paid, thinking the loss was fair. Notice of the loss was given by the defendant to the plaintiff on the 20th of *April*; part of the money was paid at that time, and the remainder on the 6th of *May* following; on which day the defendant passed the whole sum in his account with Messrs. *Ludlow* and *Shaw*, and gave credit to them for it against a sum of 3,000*l.* in which they stood indebted to him. On the 17th of *May*, notice was given by the plaintiff to the de-

(r) *Per Lord Mansfield. Cowp.* 566. 568. See also *Sadler v. Evans*, 4 *Burr.* 1984. *Bul. N. P.* 133. *S. P.* (s) *Cowp.* 565.

defendant that it was a foul loss. At this time nothing had happened to alter the situation of the defendant, or to make it different from what it was on the 20th of *April*: he had accepted no fresh bills, advanced no sum of money, nor given any new credit to his principals; but affairs between them and him remained precisely in the same situation as on the 20th of *April*. The question at the trial was, whether this action could be maintained against the defendant, as *agent* of the insured; which depended on this; whether the defendant's having placed this money to the account of his principals, in the manner before stated, was equivalent to a payment of it over.

Lord Mansfield, Ch. J. "It is argued that this is not a mere placing to account, but a making *rest*. If it were, it would not vary the case a straw. There was no new credit, no acceptance of new bills, no fresh goods bought, or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th of *April*. What then is the case? The defendant has trusted *Ludlow* and Co., and given them credit. He traffics to the country where they live, and has agents there, who know how to get the money back. The plaintiff is a stranger to them, and never heard of their names. Is it conscientious then, that the defendant should keep money which he has got by their misrepresentation, and should say, though there is no alteration in my account with my principal, this is a hit; I have got the money, and I will keep it? If there had been any new credit given, it would have been proper to have left it to the jury to say, whether any prejudice had happened to the defendant by means of this payment: but here no prejudice at all is proved, and none is to be inferred. Under these circumstances, I think that the defendant has no defence in point of law, and in point of equity and conscience he ought not to retain the money in question." The rest of the Court were of the same opinion.

Where money is paid to an agent, or servant, and he misapplies it, the person paying it has his remedy against the principal, or agent, at his election.

Thus, in the case of *Cary v. Webster*. (1) The defendant was a clerk of the *South Sea* Company, and took in the payments on the third subscription: the plaintiff paid him 600*l.*, and he, by mistake never entered it in the book, but however paid it over to the com-

(1) *S. R.* 480.

pany. The Chief Justice ruled, that no action would lie against him; that if he had not paid it over, the plaintiff would have had his option, either to charge him or the Company; as in the common case of payment to a goldsmith's servant, who does not carry it to the account of his master, the party has an election to go against either: he may charge the servant, because till the money is paid over the servant receives it to his use; or he may pass by the servant, and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master.

Though in general an agent is not liable to be sued upon a contract made by him, on behalf of his principal, yet if he make an absolute engagement to perform it *personally*, he may be sued upon such engagement.

Thus, in the case of *Thomas v. Bishop*, (u) where one *Mildmay*, agent to the *York Buildings Company*, residing in *Scotland*, drew a bill of exchange in favour of J. S. on their cashier in *London*, which bill ran thus: "To Mr. *H. Bishop*, cashier to the Honourable Governor and Assistants of the *York Buildings Company*, at their house in *Winchester-Street, London*. Pay to J. S. or his order, 200*l.*, and place it to the account of the *York Buildings Company*, for value received, as *per advice*." Mr. *Bishop* accepted the bill generally, viz. "Accepted, *J. Bishop*." The question was, whether this general acceptance should charge *Bishop* in his own right? It was saved for the judgment of the court, after a verdict at *nisi prius* for the plaintiff; and it was resolved by the Court that he was *personally* liable.

It is also said, (v) "that if a servant makes a written undertaking in this form: "*Memorandum, that I have received of J. S. to the use of my master, the sum of 40*l.*, to be paid at Michaelmas following*." The servant is liable hereby; for though in the memorandum it is said to be to the use of his master, yet the payment being indefinite, must be understood to be by him who sealed the bill: but if it had expressed to be repaid by his master, that the servant would not have been liable."

(u) 2 *Kel.* 136. pl. 116. 2 *Barnard. K. B.* 320. *S. C.* *Sura.* 955. *S. C.*

(v) *Talbot v. Godbolt*, *Telv.* 137. 2 *Kel.* 138. But see *Proc Chan.* 46. *Abr. Eq.* 308.

And in the case of *Appleton v. Binks*, (w) which was an action of *covenant* upon articles of agreement between the plaintiff on the one part, and the defendant, by the name and description of T. Binks, of, &c. (for and on the part and behalf of Lord Viscount Rokeby,) of the other part; whereby the defendant for himself, his heirs, &c. on behalf of the said Lord Rokeby, covenanted with the plaintiff that the said Lord Rokeby should pay a certain sum of money to the plaintiff, in consideration of the conveyance in fee of certain premises, &c.

On the part of the defendant it was contended, that the action did not lie against him, upon articles describing him to be merely agent for another. But the Court said, "that it was impossible to contend that where one covenants for another, he is not to be bound by it; the covenant being in his own name, "for himself, his heirs," &c. There was nothing unusual or inconsistent in the nature of the thing, that one should covenant to another that a third person should do a certain thing, as that he should go to Rome. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal. Here the defendant covenants for himself, not in the name of his principal, and puts his own seal to it. There is nothing against law in it, if he will bind himself for his principal. He probably consented to it upon an indemnity."

4. *Of Sales, &c. on a del credere Commission.*

Del credere is an Italian mercantile phrase, (*) and signifies a particular kind of credit or responsibility, and when applied to the situation of a factor, it is understood in the following sense: a factor who has general orders to dispose of goods for his principal, and, in consideration of being paid an additional commission, (x) acts in nature of an insurer to him, by taking upon himself the risk of bad debts; and thereby making himself absolutely liable, in the first instance, for the payment of the price of such goods, in the same manner as if he were himself the purchaser, and was debited for them by the principal as such. (y)

(w) 5 East Rep. 148. * Vide 6 Bro. P. C. 287. oct. ed.

(x) The del credere commission is usually $1\frac{1}{2}$ or 2 per cent. in addition to the customary commission for selling, &c. (y) Vide 1 Term Rep. 112.

Thus, in the case of *Mackenzie and another v. Scott*, (a) where a factor, under a commission *del credere*, sold goods and took accepted bills from the purchasers, which he indorsed to a banker at the place of sale, and received the banker's bill, (payable to the factor's order) on a house in *London*. This last bill the factor indorsed and transmitted to his principal, who got the same accepted; but the acceptor and drawer afterwards failed. It was held, that the factor was answerable for the amount of the bill; being personally liable, under his commission *del credere*, to satisfy his principal the price of the goods sold.

5. Of Sales, &c. by Auctioneers.

An auctioneer employed to sell the goods of a third person by auction, may maintain an action in his own name, for *goods sold and delivered* against a buyer, though the sale be at the house of such third person, and the goods known to be that person's property.

Thus, in the case of *Williams v. Millington*, (a) which was an action of *assumpsit* for goods sold and delivered, and money paid. The plaintiff was an auctioneer, and employed by one *Crown* to sell his goods by auction; the sale was at the house of *Crown*, and the goods were known to be his property; the defendant bought goods to the amount of 7*l.* 9*s.* 6*d.* and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2*l.* 4*s.* 6*d.* in cash, and put a receipt into his hand for five guineas, as for a debt due from *Crown* to the defendant. While the plaintiff was hesitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods. Afterwards, the plaintiff being called upon by *Crown*, paid to him (who refused to accept the receipt) the whole sum for which the goods were sold to the defendant, and brought this action to recover the five guineas, in lieu of which the receipt was offered.

The question was, whether the action was properly brought in the name of the auctioneer?

Lord *Laughborough*, Ch. J. said, "This case arises on circumstances which do not often happen; the defendant having practised a trick upon the plaintiff by driving off the goods in a cart, and at

(a) 6 Bro. P. C. 200. *ost. ed.* (a) 1 H. Bl. 81.

the same time holding out the money in sight, together with the paper containing a receipt for the debt due from *Crown*, the owner. Though the defendant shall not be suffered to avail himself of such conduct, yet I entertain no sort of doubt on the general question, being extremely clear that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner, or in a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction-duty, which he is bound to pay. In the common course of auctions, there is no delivery without actual payment; if it be otherwise, the auctioneer gives credit to the vendee, entirely at his own risk. Though he is like a factor, therefore, in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompence of a commission *del credere*. It is not a true position that two persons cannot bring separate actions for the same cause: the carrier and the owner of goods may each bring actions on a *tort*; the factor and owner may each have actions on a contract. I am therefore, upon the whole, decidedly of opinion, that this action may well be maintained. The other Judges concurring, judgment was given for the plaintiff.

Upon the same principle an auctioneer is personally liable to be sued for the recovery of the deposit money, where a valid title cannot be made to a purchaser.

Thus, in the case of *Burrough v. Skinner*. (b) The defendant was an auctioneer; and, in that character, had sold to the plaintiff an interest in land, for which the plaintiff had paid him a deposit of 50*l*.; but, upon an objection to the title, and the want of disclosure of certain circumstances which ought to have been disclosed at the time of the bidding, the plaintiff (the purchaser) declined going on with the contract; and, in the opinion of the Court, she had sufficient reason for so doing. She therefore re-

(b) 5 *Bur.* 2639.

quired the auctioneer to pay her back her deposit of 50*l.*; the auctioneer refused; whereupon the bidder brought this action against him to recover it. The auctioneer paid 8*l.* into court: the cause was tried, and the plaintiff obtained a verdict. The auctioneer moved for a new trial; and had a rule to show cause.

But, upon showing cause, the Court were clear that the action lay against the auctioneer. They said, "The money does not appear to have been paid over by him to his principal: but if it had been so, yet the objection appears to have been made before it either was or ought to have been so paid over. He was a stakeholder, a mere depositary of the 50*l.*, and ought not to have parted with it till such time as the sale should be finished and completed, and it should appear in the event to whom it properly belonged." They also thought that the auctioneer had acknowledged himself to be liable to the action by paying money into court. The rule was therefore discharged, and the plaintiff had judgment.

So, where an auctioneer employed to sell fixtures, has notice that they do not belong to his principal, and he, notwithstanding, proceeds to sell them, he is *personally* liable to the real owner in an action of *assumpsit* for the produce of the sale. (c)

So, where an auctioneer does not disclose the name of his principal at the time of the sale, and the contract is not completed, he is personally liable to an action of damages.

Thus, in the case of *Hanson v. Roberdeau*, (d). The plaintiff had bought a *post obit* bond at an auction, where the defendant acted as auctioneer, and the bond not being assigned within the time agreed upon by the conditions of sale, the plaintiff brought the present action of *assumpsit* against the auctioneer.

The name of the principal was not mentioned at the time of the sale, and one of the conditions was, that 25*l.* *per cent.* should be paid as a deposit; but although the plaintiff was to give 645*l.* for the bond, only 50*l.* was paid down, which it was proved the defendant agreed to accept as a deposit.

Two objections were taken by the defendant's counsel; 1st, that the agreement was not complied with on the part of the

(c) *Hardacre v. Stewart*, 5 *Esp. Rep.* 103. (d) *Peake's Cas. N.P.* 120.

plaintiff, the whole deposit money not being paid; 2dly, that the principal, and not the auctioneer, was liable to an action.

Lord *Kenyon*, Ch. J. said, "The defendant, after having agreed to take 50*l.* for the deposit, cannot object that too little was paid. And though where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is intitled to look to him *personally* for the completion of the contract."

An action does not lie against an auctioneer, at the suit of his employer, for selling goods at the highest price bid for them, under the usual conditions of sale, though he might have had the owner's express directions not to let them go under a larger sum named. He would, however, be liable, if the owner had directed him to *set* the goods *up* at a particular price, and not lower.

Thus, in the case of *Bexwell v. Christie*, (e) which was an action on the case against the defendant (an auctioneer) for negligently selling the plaintiff's gelding, which he had directions not to let go under 15*l.*, for a less sum, *viz.* 6*l.* 16*s.* 6*d.* contrary to such directions. The conditions of sale were, "That the goods should be sold to the *best bidder*." Lord *Mansfield*, said: "There is no express undertaking on the part of the defendant, nor is it a direction that there should be no bidding under 15*l.* which might be fair: but the direction given to the defendant is, "Not to let the horse go under 15*l.*;" which implies there might be a bidding under that sum. The question then is, whether the owner can privately employ another person to bid for him. The basis of all dealings ought to be good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder: that could never be the case, if the owner might secretly and privately enhance the price, by a person employed for that purpose; yet tricks and practices of this kind daily increase, and grow so frequent, that good men give into the ways of the bad and dishonest in their own defence. An owner of goods set up to sale at an auction never yet bid in the room for himself. If

(e) *Cowp.* 395.

such a practice were allowed, no one would bid. It is a fraud upon the sale, and upon the public. The disallowing it is no hardship upon the owner. For if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, and not lower: such a direction would be fair: or he might do as was done by Lord *Asburnham*, who sold a large estate by auction; he had inserted in the conditions of sale, that he himself might bid once in the course of the sale: and he bid at once 15 or 20,000*l*. Such a condition is fair; because the public are then apprised, and know upon what terms they bid. In *Holland* it is the practice to bid downwards. Therefore, upon full consideration, I am of opinion, that a bidding for the owner in the manner contended for, and agreeable to the directions given in this case, would have been a fraud upon the sale: and consequently, that this action against the defendant as auctioneer, cannot be maintained." The other judges were of the same opinion.

An auctioneer having sold an estate, received a deposit of the purchaser; but the title being discovered to be defective, an action was brought against him to recover back the amount of the deposit, which he accordingly paid; together with the costs of the action: it was ruled, (*f*) that the auctioneer could not recover the amount of the costs against his principal in an action of *indebitatus assumpsit*, for money paid; but should declare *specialty*.

So, where an auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick at the time of sale, with the privy of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of the 19 Geo. III. c. 56. and 28 Geo. III. c. 37.: but being asked at the sale whether he had taken the proper precautions to avoid the duty in case there were no sale, he said, that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price, it was no sale or duty: In point of fact there was no sale. The duty, however, did attach in consequence of the auctioneer not having taken the precautions re-

(*f*) *Spurrier v. Elderton*, 5 *Ess. Rep.* 1.

quired of the owner by the statutes under such circumstances, and the auctioneer was sued for the duty on his bond to the crown, and compelled to pay it: the Court of *King's Bench* (g) decided that the auctioneer could not recover it over against the owners, he having warranted that proper precautions had been taken to prevent the duty attaching in the event; though both parties were mistaken in the law.

6. *Of Contracts and Agreements between Principal, Factor, and Agent inter se: And of their respective Rights and Remedies, &c. And, First, of a Factor or Agent's liability on a Promise to Indemnify his Principal upon a Re-sale of Goods, &c.*

Where a broker buys goods for his principal, and agrees for a certain *per centage* to indemnify him from any loss on the re-sale of them; if the principal has a fair opportunity of selling the goods to advantage, but neglects it, the broker is discharged, though the principal afterwards sells them at a loss.

Thus, in the case of *Curry v. Edenfor*, (h) where it appeared that the plaintiff, through the medium of the defendant, his broker, had made two purchases of cotton, the one of 50 bags from *Batman*, the other of 40 bags from *Entwistle*: and the defendant engaged for $\frac{1}{2}$ *per cent* to indemnify the plaintiff from any loss on the re-sale of them. It appeared that the market price of cotton had risen gradually for about three weeks after the purchase, of which advantage the plaintiff did not avail himself, though there was evidence to show that he was in the habit of attending the market, but he waited for some weeks longer, when he re-sold them at a considerable loss: to recover which difference the present action was brought upon the defendant's contract of indemnity. A verdict was given for the plaintiff. But, upon a motion for a new trial, Lord *Kenyon*, Ch. J. said, "I think, on the fair construction of the contract of indemnity, that the defendant is discharged under the circumstances which have happened; for the fair import of the con-

(g) *Capp v. Topham*, 6 *East Rep.* 392. (h) 3 *Term Rep.* 524.

tract is, that the defendant should guarantee to the plaintiff that he should be enabled to make a profit of the cotton; and there was evidence to show that there had been a gradual rise in the market for three weeks afterwards, during which time the plaintiff might have made considerable profits if he had chosen to avail himself of the opportunity. And having lost that opportunity, I think, he cannot now have recourse to the defendant. If the agreement had been that the defendant was bound to give the plaintiff information respecting the time when these goods could be re-sold to the greatest advantage, there would have been some ground for the plaintiff's argument: but that was not necessary; and, indeed, it appears that the plaintiff must have been fully apprised of the gradual rise of the market, as he was in the habit of attending it. If this were not sufficient to satisfy the contract of indemnity, no other line could be drawn. Therefore I am of opinion that there should be a new trial."

Buller, J. "The meaning of the guarantee seems to me to be this, 'I will engage (said the defendant) that you may sell the cottons for as much as you gave for them.' That is the full extent of the contract: if so, it remains to be inquired whether the plaintiff could have sold the goods at an advanced price, and whether or not he has been guilty of negligence in not having so done. There is no doubt upon the evidence but that he might have re-sold them at a considerable advance. But it is objected that it does not appear that the plaintiff knew of the rise of the market, and that the defendant was bound to give him notice of it. To this it may be answered, that the plaintiff, having engaged in a mercantile transaction, and having speculated on the rise and fall of the market, was bound to take notice of the true state of it. In such a case as this, where there was a continued advance in the price for three weeks, it was not necessary for the defendant to call on the plaintiff to re-sell the goods. If indeed there had been a sudden rise in the market for a few hours, or for one morning, and that was known to the defendant and not to the plaintiff, the former would not have been discharged, unless he had informed the latter who then neglected to take advantage of it. But here it is clear, upon the evidence, that the plaintiff might have made some gains if he had chosen to avail himself of the opportunity. He neglected, however, to take that opportunity, and chose to speculate still further, but that he could not do at the defendant's

fendant's risk; for if he *might* have profited by a re-sale of his goods and did not, that is sufficient to discharge the defendant." A new trial was accordingly granted.

2d. *Of the Remedy against a Factor or Agent for not Accounting, and for Negligence, &c.*

Where goods are delivered to a Factor or agent to be sold and disposed of for his principal, the law implies a promise on the part of the factor that he will render an account of them whenever called upon by the principal: But if he refuse to account, he is liable to an action of *assumpsit* for the breach of his implied promise. (i) If, however, there be a long and intricate account between the principal and his factor, the proper remedy is by action of *account*, wherein auditors are appointed by the court to inspect and examine the accounts of the parties, and to make all just allowances. (k)

So, where a factor or agent has actually received money on account of his principal and refuses to pay it over, an action of *indebitatus assumpsit* lies against him for so much money had and received. (l)

So, where A. appointed B. his deputy to an office; and it was agreed that B. should account with A. for all fees, &c. according to the table of fees belonging to such office, and pay him three-fourth parts thereof, and retain the other fourth part for his trouble. Certain fees were received by B. which he insisted upon being solely entitled to, because they were *not contained in the table*; but it was held, (m) that B. should account with A. for all fees ascertained by the table, according to the table; and for all fees not mentioned therein, according to his receipts, and pay over three-fourths of the whole to A.

(i) See 1 *Salk.* 9. *Carth.* 89. *S. C.* where the promise was express. But actions are now frequently brought upon implied promises only.

(k) 12 *Mod.* 517. *Godfrey v. Saunders*, 3 *Wils.* 94. 117. *Bac. Abr.* tit. *Account*.

(l) 2 *Sbo.* 301. pl. 297. 2 *Mod.* 263. *Com. Dig.* tit. *Action of Assumpsit*. A. 1.

(m) *Machen v. Stanyon*, 1 *Bro. P. C.* 133. 8vo ed. See also *Bullrode v. Gilburn*, 2 *Str.* 1027. *S. P.*

We are now to consider in what cases a factor or agent is answerable to his principal for neglect of duty.

ante 236
M. P. 43, 44
 If a merchant directs his factor or correspondent to insure, and he neglects doing so, he is liable to an action for this neglect of duty.

Thus, in the case of *Smith v. Lascelles*, (n) which was an action on the case for neglecting to make an insurance on the freight of goods shipped from *Dominica* to *London*. The facts were, that the plaintiff, being indebted to the defendant in 850*l.* in *February* 1785 mortgaged to him his interest in the goods and freight, by way of security; in which mortgage was contained a proviso, that the deed should be void in case of payment in *August* 1785. In *July* 1785, the plaintiff in a letter inclosing the bills of lading, desired the defendant to procure an insurance on the goods and freight, which letter could not have been received before the mortgage became absolute. The defendant did cause insurance to be made on the goods, though not on the freight. At the trial, proof was given of a letter having been received by the defendant from the plaintiff, but it did not appear whether it was the letter in question,

A verdict having been found for the plaintiff, a motion was made to set aside the verdict; but the court refused the rule, and held, that the plaintiff was entitled to recover. *Buller, J.* said, "It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them be such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, If the merchant abroad send bills of lading to his correspondent

(n) 2 Term Rep. 187. See also *Delancy v. Stoddart*, 1 Term Rep. 22. S.P.
 here,

here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true, as it has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading the other to cause an insurance to be made, the correspondent here cannot accept it in part, and reject it as to the rest. If such be the law on this subject, the fact in this case is clear; for, with regard to the letter, there is no pretence for saying, that any order was received by the defendant from the plaintiff, but that containing the order of insurance, and the jury have so found it.

So, where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured, the court held, that the merchant was liable to make good the loss to his correspondent. (o)

So, where a merchant directs his factor (p) or correspondent to insure, and he charges him with it as if done, and a loss happens; he shall be charged as insurer: but if the factor employs an agent, this equity will not extend to that agent.

But, if an agent, to whom orders to insure are sent, does what is usual to get the insurance made, that is sufficient; (q) because he is no insurer, and is not obliged to get insurance at all events. Thus, if he send to *Lloyd's*, and the underwriters refuse to take the risk at any premium; and he afterwards send to get insurance done at *Newcastle*, he has done his duty, and can never afterwards be charged in this action; more especially if the plaintiff adopt and approve his acts.

And in order to maintain an action on the case against an agent for negligence, the principal must show, that the agent was guilty either of a breach of *positive orders, gross negligence, or fraud.*

(o) *Wallace v. Tellfair*, 2 Term Rep. 188. s. a.

(p) *Tickel v. Short*, 2 Ves. 239.

(q) *Smith v. Cologan*, 2 Term Rep. 188. s. a.

Thus, in the case of *Moore v. Mourgue*, (r) which was an action brought by the plaintiff, who was a merchant at *Alicant*, against the defendant, his agent in *London*, for misbehaviour, in not insuring the plaintiff's goods agreeable to his directions. The goods were a cargo of fruit; and by the letters produced in evidence, it did not appear that the plaintiff had given the defendant any particular directions how or with whom to insure; but only generally, to insure the cargo. The defendant insured with the *London Assurance Office*, who, in policies upon fruit, always put in an exception, "free from particular average." This policy was made therefore with that exception. The loss was not entirely a total loss; for though the goods were at first under water, some were saved; but those that were damaged would not pay the salvage of them. Upon the trial the jury found a verdict for the defendant; and one of them said, the ground of their verdict was, because they thought he had acted *bonâ fide* to the best of his judgment.

The plaintiff moved for a new trial; but the court refused the rule. And Lord *Mansfield*, said, "To maintain this action, the defendant must be guilty either of a *breach of orders*, *gross negligence*, or *fraud*. Now my direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted *malâ fide*, they should find for the plaintiff: If, on the contrary, they were of opinion that he had acted *bonâ fide*, and to the best of his judgment, then they should find for the defendant. In delivering their verdict they say, they did not think the defendant guilty of gross negligence, or that he acted *malâ fide*: The court therefore will not say so. The plaintiff, if he pleased, might have given orders to the defendant not to insure at the *London Insurance Office*; but at some other office where this exception would not have been insisted on. But he gives no directions at all. Therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters. It seems the *Exchange Assurance* and the *London Assurance Office* differ in the form of their policy: but though the one runs a risk which the other does not, the premium is the same. There could be no temptation therefore to the defendant as to his choice between them. If upon all the circumstances, the jury had found for the plaintiff, it might have been a cast whether the court would

have granted a new trial. *A fortiori*, in a hard action, where, as no particular orders were given, there has certainly been no breach of orders; where the defendant appears to have acted *bona fide*, and where the plaintiff has himself been guilty of the first omission in giving no directions at all, there seems to be no ground for the court to interpose against the defendant. Therefore I am of opinion the verdict ought to stand."

A banker in *London* receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a check upon a banker for the amount, although it turn out that such check is dishonoured.

Thus, in the case of *Russell v. Hankey*, (s) where it appeared that the defendants were bankers in *London* in correspondence with the plaintiffs, their customers in the country: that the bills in question, which had been indorsed to the plaintiffs in the course of negotiation, had been transmitted by them to the defendants in order to obtain payment from the acceptor, who resided in *London*, and to carry the amount to the account of the plaintiffs. That the defendants accordingly tendered the bills to the acceptor for payment, when he gave them a check upon a banker in *London* for the amount, upon the receipt of which check they delivered up to the acceptor the bills in question. It turned out that the check was dishonoured, the person on whom it was drawn having no account with the drawer. Upon these facts, which were not disputed, the plaintiffs contended, that the defendants had been guilty of negligence in giving up the bills for the check they had received in payment, without previously enquiring whether or not the check would be honoured. The defendants on the other hand insisted they had only done what was usual in the ordinary course of trade and business of bankers, and therefore ought not to be answerable for the event; and Lord *Kenyon*, Ch. J. before whom the cause was tried, being clearly of this opinion, the plaintiffs were nonsuited.

A motion was made to set aside the nonsuit upon the ground before stated. But the court said, "We dare not even grant a rule to show cause, as it would be putting the whole trade of *Lon-*

(s) 6 Term Rep. 12.

don in suspense pending it. There is no ground to impute negligence to the defendants."

If an officer on foreign service sends in his resignation to the agent of the regiment for the sale of his commission, the agent must take care to secure to him the purchase money.

Thus, in the case of *Sturdy v. Rossi*, (t) which was an action of *assumpsit* for money had and received. The action was brought by the plaintiff, who had been an ensign in the 54th regiment of foot, to recover from the defendant, who was agent to the regiment, the sum of 400*l.* and interest, being the amount of the sale of his commission, on quitting the regiment.

For the plaintiff it was proved, that he being absent in *America*, doing duty with the regiment, had transmitted to the defendant, as agent of the regiment, his resignation.

On the other side, it was proved, that this resignation is delivered to the colonel of the regiment, who accepts it, and sends in with it to the war office a recommendation of the successor; but it was ~~not~~ in evidence, that no commission is made out for the successor, without a certificate that the money is lodged for the purpose of the purchase.

The money had in fact been paid to one *Cuthbert*, who had been in the service of the defendant, and who, the plaintiff contended, was so at the time of the money paid; but the defendant relied, that after the resignation was handed over by him to the colonel, his responsibility was at an end; and in the present instance, *Cuthbert* having been the private agent of the colonel, it was further relied, that the money had been paid to him in that capacity; so that if any person was liable it was the colonel. *Cuthbert had died insolvent.*

An army agent also gave in evidence, that when he sold a commission, he secured the purchase money, unless where the parties settled it among themselves; and that he had never received the resignation of any commission which another person had sold.

Lord *Kenyon*, Ch. J. ruled, that where the officer was absent on *foreign service*, it was the duty of the agent, when the resignation was sent in to him, to take care that the purchase money was properly secured to him, as otherwise the situation of officers abroad would be subjected to much risk and inconvenience; that

(t) 1 *Esp. Rep.* 450.

in the present instance, the defendant must be considered as adopting the acts of *Cutbert*, and therefore liable for money received by him in that capacity. The jury found a verdict for the plaintiff for the whole sum and interest.

Where A. entrusted B. with goods to sell in *India*, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B. not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in *England*. It was held, (v) that A. could not maintain trover against B. for the goods.

3dly. *Of the Factor's Lien on the Goods, &c. of his Principal.*

A factor has a lien on goods consigned to him, for the general balance due to him, as well as for incidental charges attending the particular goods in his hands: (u) But this lien remains so long only as he retains the possession of the goods; for if he parts with the possession he parts with his lien, because it cannot then be retained as an *item* for the general account. (w)

In the case of *Drinkwater v. Goodwin*, (x) however, it was held, that a factor has a lien on the price of the goods in the hands of the buyer; for though he has not the actual possession of them, yet if he has a power of giving a discharge, or bringing an action, he has a right to retain the money in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, though he is not in possession.

But though the general rule of law be, that a factor has a lien on the goods of his principal for his general balance, yet this like

(v) *Bromley v. Coxwell*, 2 *Bos. and Pul.* 438.

(u) *Kruger v. Wilcocks*, *Ambl.* 252. 1 *Bur.* 494. 1 *Bl. Rep.* 104. 6 *East* 23. in *notis. S. C.* See also *Lickbarrow v. Mason*, 2 *Term Rep.* 63. And the very elaborate and learned opinion delivered by Mr. Justice Buller on this case in the House of Lords, as given in 6 *East Rep.* 21. n. 4.

(w) *Vis. Sweet v. Fym*, 1 *East Rep.* 4. (x) *Cowp.* 251.

other general rules may be controlled by the agreement of the parties; as if A. deposit goods with B. for sale, and B. promise to pay the proceeds to A. when sold; B. has no lien on these goods (if not sold) for the balance of his general account arising upon other articles; the express stipulation in this case negating the general rule of law. (y)

So, a factor has no lien on goods for a general balance, unless they come into his *actual* possession. (z) And if a factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo consigned come into possession of the factor, his assignees have no property in such cargo, and cannot recover the produce of it against the assignees of the principal, if they have sold it and received the purchase money. (a)

So, where a trader, after a secret act of bankruptcy, consigns goods to a factor, who advances money thereon; the latter has no lien on such goods, but must deliver them up to the assignees of the bankrupt trader. (b)

So, if A. employs a factor to sell goods he has no lien upon them, in respect of any debt due for other goods sold by him in *his own name* to A. on the account of another employer, previous to his being employed by A.

Thus, in the case of *Houghton* and another assignees of *Jackson*, a bankrupt, v. *Mathews* and another, (c) which was an action of trover, in which it appeared, that the defendants who were brokers had on the 3d of September 1799 sold a parcel of logwood and fustic to *Jackson* the bankrupt; and on the 11th of the same month, a parcel of indigo; neither of which parcels were paid for at the time of *Jackson's* bankruptcy; the logwood and fustic was the property of a person of the name of *Greatham*, and the indigo of a person of the name of *Dixon*; both these parcels had been put into the hands of the defendants by the proprietors, to be sold by them as brokers, and both sales were effected in the names of the brokers only, it being their practice to sell in their own name, where the party for whom they sold was indebted to them. At the time of such sales,

(y) *Walker v. Birch*, 6 Term Rep. 258. See also *Skiffen v. Wray*, 6 East Rep. 371. (z) *Kinloch v. Craig*, 3 Term Rep. 119.

(a) *Kinloch v. Craig*, 3 Term Rep. 783. 4 Bro. P. C. 47. 8vo ed S.C.

(b) *Copland v. Stein*, 8 Term Rep. 199. (c) 3 Bos. and Pul. 485.

and when this action was commenced, there was a balance due both from *Greatham* and from *Dixon* to the defendants. Soon after the above sales, *Jackson*, the bankrupt, put into the hands of the defendants the indigo in question, to sell, as brokers; no advance being made by them upon the indigo, nor any debt existing between the defendants and *Jackson*, other than what was due to the former for the goods of *Greatham* and *Dixon*, purchased by *Jackson* of the defendants, as before mentioned. Indeed the commission to sell the indigo in question, was the first time the latter had ever employed the defendants as brokers. While the indigo in question still remained unsold in the hands of the defendants, as brokers, *Jackson* became a bankrupt. Upon this the plaintiffs, as his assignees, demanded the indigo, and tendered payment of any charges which might have been incurred in respect of that article; the defendants refused to deliver it up, claiming a lien upon it for the debt due from the bankrupt, in consequence of the goods of *Greatham* and *Dixon* sold to him, and which still remained unpaid for.

The court were of opinion, that the defendants had no lien for the debt due to *Greatham* and *Dixon*, and that the assignees were entitled to recover.

Chambre, J. said, "The question is, whether when a broker receives goods to sell for A. he is entitled to retain them though unsold, after a tender of all charges due in respect of those goods, on the ground of a lien for the price of other goods sold by him for B. to A. under a general authority from B. to sell, there being no general balance due from A. to the broker, and the broker not having sold the goods of B. under a *del credere* commission? I state the question thus, because I conceive that in the present case, the mere act of the bankrupt buying goods of the defendant did not constitute the relation of principal and factor between them. The demand of the defendant upon the first goods did not arise out of any course of dealing in the relation of principal and factor, but was as foreign to that relation as if it had arisen upon a legacy, or any other species of debt the most remote from that course of dealing. I do not find any authority for saying, that a factor has any general lien in respect of debts which arise prior to the time at which his character of factor commences; and if a right to such a lien is not established by express authority, it does not appear to me to fall within the general principle upon which the liens of factors have been allowed. It

seems

seems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but debts which are incurred prior to the existence of the relation of principal and factor, are not contracted upon this principle. And if the lien now contended for were allowed, instead of inducing persons to place goods in the hands of factors, it would operate the contrary way, since it would tend to prevent insolvent persons from employing their creditors as factors, lest the goods entrusted to them should be retained in satisfaction of former debts. If this were the only point in this case, I should be of opinion, that the defendants were not entitled to retain: but laying this point out of the question, I still think the debts due from the bankrupt, in respect of the goods sold to him, are not to be considered as due to the defendants, so as to authorize them to set off such debts, in an action brought against them by the bankrupt's assignees, and that the defendants have no property or interest whatever in those debts. I never yet heard of a person being allowed to protect himself, by setting up debts in reality due to other persons; or that a factor, having no demand on his principal, could, by transactions with a third person, create a new interest in himself."

But the assignee of a policy of insurance on goods, (d) who becomes such by the indorsement to him of the bill of lading of the goods by the consignor, after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no *sub-lien* on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person.

So, where a principal gives notice to his factor (e) of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which the factor accepts; and afterwards the principal dies; but his executors direct the captain

(d) *Man v. Shifner*, 2 *East Rep.* 523.

(e) *Hammonds v. Barclay*, 2 *East Rep.* 227.

of the ship to follow his former orders; who thereupon delivers the ship into the possession of the factor, who sells the same; it was held, that the factor has a lien upon the proceeds as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due.

4thly. *In what Cases a Factor or Agent is not entitled to recover for Commission, or Money paid, &c.*

In the case of *Hereford v. Powell*, (f) it was ruled by Holt, Ch. J. "That where a factor abroad deserves money for factorage, he cannot bring an action for his factorage, unless the principal refuse to come to account; and if it appears that the factor hath money in his hands, he may detain, and cannot bring an action for his factorage: but if he were directed to vest all the produce of the adventure in wines, or other goods, then he might bring an action for his factorage, because he cannot detain, and hath no other remedy.

So, a factor or agent shall not have any salary allowed him where he acts against the interest of his principal. (g)

So, a broker who contracts with others for the sale of stock at a future day by the authority of his principal, who afterwards refuses to make good the bargain, cannot, by paying the difference to such third persons, maintain an action on an implied *assumpsit* against his principal for the amount; such payment being considered voluntary for which no action can be maintained. (h)

(f) *Holt's Rep.* 467.

(g) *Maxwell v. Sharp*, H. M. S. S. See also 8 Brq. P. C. 339. 840 ed.

(h) *Vide Child v. Morley*, 8 Term Rep. 610.

CHAPTER V.

Of Contracts by Agents of Government, &c.

AN officer appointed by government, treating as an agent for the public, is not liable to be sued upon a contract made by him in that capacity, unless he make an absolute and unqualified undertaking to be *personally* responsible.

Thus, in the case of *Macbeath v. Haldimand*, (a) which was an action upon promises against the defendant, as agent, for work and labour. The cause was tried before *Buller*, Just. and at the trial a verdict was found for the defendant, by the direction of the learned Judge, under the following circumstances, which were reported to the Court of *King's Bench*, upon a motion for a new trial.

In the year 1779, the defendant being governor of *Quebec*, appointed Captain *Sinclair* to the command of a fort called *Michilimakinac*, situated upon the lake *Huron*, in the province of *Canada*. On the 17th *August* 1779, the defendant transmitted certain instructions to *Sinclair* respecting the government of the fort, in which he said, "You are to pay great attention to the *Indians* resorting to *Michilimakinac*, or furnished with necessaries from thence. Endeavour to preserve them in good humour; and attach them by every means in your power to the king's interest.

In a further part of the same instructions, he added,

"You will draw bills of exchange for defraying the contingencies incident to that post, in the manner practised by Major *De Puysser*, (an officer on whom that command had been before conferred,) taking care to moderate and reduce those expences, as far as can be done without injuring the king's service."

(a) 1 *Term Rep.* 172. Note, the rule of law which is laid down in this case applies equally whether the contract be by parol or by deed. *Vide* *Unwin v. Wolfeley*, *ib.* 674.

For some time *Sinclair* employed one *Grant* to distribute presents among the *Indians*, and to procure military stores, &c. for the use of the garrison; and, to defray these and other expences, drew bills of exchange upon the governor, according to his instructions. When these accounts came to the defendant he made objections to several of the articles as unnecessary and exorbitant; and soon after recommended the plaintiff to *Sinclair* by a letter dated the 16th of *May* 1782, of which the following is an extract:

“ Upon an examination of the accounts accompanying your late drafts, for expences incurred at *Michilimakinac*, the articles are, in general, charged at prices exceeding all bounds of moderation.”

“ Upon comparison of the prices made here, the advantage taken of the necessities of the Crown by the traders at *Michilimakinac*, is shamefully obvious; and it is more so in the account of Mr. *Grant*, who appears to be an agent for government, than in any other particular.

“ Persuaded that you have supplied your wants from those traders in whom you have had the greatest reason to confide, I find there is but little to be expected from any of them residing at that post; which induced me to make enquiry if any person could be found here more worthy of the public confidence. A Mr. *Macbeath*, who will deliver this letter, and who has just made application for a pass, was mentioned to me as a man of known and established integrity; and, upon a particular enquiry, I find that he has always, both here and in the upper country, merited that character. I have proposed to him to supply the Crown with such quantities of *Indian corn* and grease as may be wanted for the necessary purposes at that post; and likewise all other articles which shall occasionally be wanted in the engineer department, which he has undertaken to do for 10l. per cent. on the market prices at the place, (costs and charges); a profit which appears to be reasonable, inasmuch as it is greatly under that hitherto charged.”

(After some orders given relative to the plaintiff,)

“ These instructions, and all others that concern the interest of the Crown, I am persuaded that you will cheerfully give him.”

A letter from the defendant to the plaintiff, dated *May* 17th, 1782:

“ Having thought it fit to direct Lieutenant Governor *Sinclair*, commanding the post of *Michilmakinac*, to employ you in supplying such quantities of corn and grease, and all other articles, as shall be wanted for the use of the Crown at that post, in consequence of your offer to furnish the same at the rate of 10*l.* per cent. on the costs and charges here and to *Michilmakinac*, for all articles, (corn and grease excepted), and these at the same rate where they shall be purchased, for which sufficient vouchers are to accompany your accounts. You are therefore hereby directed to make applications, from time to time, to Lieutenant Governor *Sinclair* for such directions, information, and assistance, as will best enable you to execute that business to the greatest advantage for the public interest, as your continuing in this employ will entirely depend upon your conduct therein.”

Several special orders were proved from *Sinclair* to the plaintiff, for supplying particular articles, amongst which was the following, dated 1st of *August* 1782 :

“ You will be pleased for the future, without any requisitions in form, to provide for the different services of the post, in the manner least expensive to government, and still equal to the necessities of the different departments.”

In pursuance of these orders, the plaintiff furnished articles to a considerable amount. But when his bills, at the top of which was prefixed “ Government debtor to *George Macbeath*, for sundries paid by order of Lieutenant Governor *Sinclair*,” were sent to the defendant at *Quebec*, he made objections to several of the articles, as being unreasonable, and furnished contrary to subsequent instructions.

Afterwards, on the 2d of *July* 1784, *Mathews* (the defendant’s secretary,) wrote the following letter to Messrs. *Dobie and Forsyth*, who were agents for the bill holders :

“ I am commanded by his Excellency General *Haldimand*, to acquaint you, that, in consequence of instructions from the Lord’s Commissioners of his Majesty’s Treasury, in answer to a representation made by him to their Lordships, concerning the bills drawn upon him by Lieutenant Governor *Sinclair*, in the year 1782, which he thought it necessary to refuse payment of, his Excellency, in conformity with the offer which he made

“ to the holders of the said bills in the year 1782, is still willing to
 “ pay such parts of the charges, for which the said bills were
 “ drawn, as at that time appeared upon examination to be rea-
 “ sonable.”

(After stating the amount of goods furnished for the engineer department to the value of 9266*l.* 5*s.* 1*d.*, which the Governor was willing to pay, the letter proceeded thus :)

“ His Excellency will also pay for all the goods or utensils
 “ furnished for the engineer department, so far as they shall ap-
 “ pear to be charged at reasonable prices, to be ascertained by
 “ merchants appointed for that purpose by his Excellency and
 “ the holders of the bills. And he will further pay for the la-
 “ bour, so far as the accounts thereof shall appear to be pro-
 “ perly vouched. But with regard to the charges for the hire
 “ of horses and carts, his Excellency, from the exorbitance of the
 “ charge, will have nothing to do therewith, leaving neverthe-
 “ less to the complainants to take such methods to procure re-
 “ dress therein, as they shall think proper.

“ With respect to the *Indian* department, his Excellency will
 “ pay such part of the articles as compose the accounts, for which
 “ the bills were drawn, as were not purchased contrary to his
 “ orders to Lieutenant Governor *Sinclair*, dated 22d of *August*
 “ 1781, and except also for the articles furnished by Lieutenant
 “ Governor *Sinclair* himself ; which his Excellency will not pay,
 “ as they were received from the *Indians*, in expectation of being
 “ well repaid by the presents which they afterwards received
 “ from the king's stores.”

(The letter then stated the account of *Indian* expences, amount-
 ing to 12,715*l.* 9*s.* 10*d.*, and concluded by saying,)

“ You will therefore see by the foregoing state, that the sum
 “ proposed by his Excellency General *Haldimand*, to be imme-
 “ diately paid, amounts to 21,981*l.* 14*s.* 11*d.*, *New-York* cur-
 “ rency.”

The bills which *Sinclair* drew in favour of the plaintiff were
 drawn on the defendant as *Governor and Commander in Chief*.

The plaintiff finding that all these bills drawn by *Sinclair*, and
 indorsed by himself, which were to a much greater amount than
 the above-mentioned sum, would not be accepted by the defend-
 ant, received a partial payment from him, with a proviso, that it

should not prejudice his claim for the remainder, to recover which was the object of the present action. The plaintiff remained in his post till 1785.

It was acknowledged, at the trial and in court, that all the accounts had been submitted to a board of officers by the defendant, for them to examine and report what charges ought to be allowed, and that the sum adjudged by them to be due, which fell very short of the plaintiff's demand, had been paid by the treasury.

Buller, J. after reporting the above facts, said that he had been of opinion at the trial that the goods in question having been supplied for the use of government, and the defendant not having personally undertaken to pay, the plaintiff ought to be non-suited. That it appeared to him that the plaintiff had acted with the defendant solely in the character of Commander in Chief, considering him as the agent of government: that all the letters imported it to be a transaction on the part of government; and that the accounts confirmed it. But the plaintiff's counsel appearing for their client when he was called, he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him whether, in the event of the defendant's not being liable, any other person was, he told them that was no part of their consideration; but, being willing to give them any information, he added, that he was of opinion that if the plaintiff's demand were just, his proper remedy was by a petition of right to the Crown. On which they found a verdict for the defendant.

The rule for granting a new trial was moved for on the ground of misdirection of the Judge upon two points.

1st. That the defendant had, by his own conduct, made himself personally liable, which question should have been left to the jury.

2^{dly}, That the plaintiff had no remedy against the Crown by a petition of right, on the supposition of which the jury had been induced to give their verdict.

Lord Mansfield, Ch. J. declared that the Court did not feel it necessary for them to give any opinion on the second ground. His Lordship said, "that great difference had arisen since the revolution

volution with respect to the expenditure of the public money. Before that period, all the public supplies were given to the king, who, in his individual capacity contracted for all expences. He alone had the disposition of the public money; but since that time, the supplies have been appropriated by parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of parliament.

That according to the tenor of Lord *Somers's* argument in the banker's case, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the banker's case; and parliament was afterwards obliged to provide a particular fund towards the payment of those debts. Whether, however, this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was unnecessary to determine; at any rate, if there were a recovery against the Crown, application must be made to parliament, and it would come under the head of supplies for the year.

In showing cause against the rule, the counsel for the defendant allowed that a person, acting in a public situation under government, might, by his own conduct, make himself personally liable for contracts, for which, from the nature of his office, he would not otherwise be answerable. But the plaintiff should make out a very strong case, in order to induce the Court to believe that such was the agreement. As if a person, residing at a distance abroad, absolutely refused to treat with the government, but chose rather to rely upon the personal security of the governor, who was upon the spot, and who was willing to treat upon those conditions. But they contended in this case that the defendant had acted avowedly as the agent of government, and did not intend to make himself personally responsible.

In support of the rule, it was contended that the evidence which was produced at the trial was such as ought to have been left to the jury to determine whether the defendant had not made himself *personally* liable.

In general, a commanding officer is not answerable for stores and other articles furnished notoriously for the use of government, but there is no doubt that he may become so by his own conduct. Here the plaintiff was directed by the defendant to obey the orders of Lieutenant Governor *Sinclair*. Every article which he furnished was in obedience to *Sinclair's* commands; and *Sinclair* himself was instructed to draw bills for the payment of those ar-

ticles, not on the government, or on any official paymaster, which would have afforded a strong presumption in discharge of the defendant's liability, but his orders were to draw on the defendant himself.

The whole question therefore should have been left to the jury, whose conduct proved that they entertained doubts upon it, till they were informed that the plaintiff had his remedy against the Crown.

But if there be no remedy in the form of a petition of right against the Crown, on account of the appropriation of the supplies since the revolution, and the public is to be considered as the real debtor, then there was no other person against whom this demand could so properly be urged as against the defendant, who represented and acted as ostensible agent for the public in this transaction.

The Court, however, determined that the defendant having contracted with the plaintiff merely as the agent of government, was not *personally* liable. And Lord *Mansfield*, Ch. J. said, "The only question before the Court is, whether the *defendant* be liable or not in this action? if he be, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party can induce the Court to make him so.

There is no colour to say that he is liable in his character of Commander in Chief.

In a late case which was tried before me, where one *Savage* brought an action against Lord *North*, as First Lord of the Treasury, in order that he might be reimbursed the expences which he had incurred in raising a regiment for the service of Government, I held that the action did not lie.

So in another case of *Lutterloh* against *Halsey*, which was an action brought against the defendant, who was a commissary, for the supply of forage for the army, and by whom the plaintiff had been employed in that service, the commissary was held not liable.

In the present case it was notorious that the defendant did not *personally* contract; the plaintiff knew at the time that he furnished the stores, that they were for the use of government; and he afterwards made government debtor in his bills.

But it has been urged that the defendant made himself liable after the debt was contracted. In my opinion there is no ground for such an argument: the evidence does not warrant it.

Then

Then it was objected, that whether the defendant had made himself liable or not, was a question which ought to have been left to the jury to decide. But there was no evidence which was proper for their consideration; for the evidence consisting altogether of written documents and letters, which were not denied, the import of them was matter of law and not of fact."

Abbott, J. said "In great questions of policy we cannot argue from the nature of private agreements. But even in these cases the question must be, what was the meaning of the parties at the time of entering into the contract?"

A person acting in the capacity of an agent, may undoubtedly contract in such a manner as to make himself *personally* liable; and that brings it to the true question here, namely, whether, from any thing that passed between the parties at the time, it was understood by them that the plaintiff was to rely upon the personal security of the defendant? But nothing appears from the evidence in this case to warrant such a conclusion. Government was made debtor; and it is evident that the plaintiff looked to them for payment: for he first made application to the treasury, and his demand against the defendant was only an after thought, when he found he could not obtain the money in any other way. Then it seems to me that there is nothing in this transaction to fix the defendant, or to show that the plaintiff considered him as his debtor at the time that the credit was given.

Great inconveniencies would result from considering a governor or commander as *personally* responsible in such cases as the present. For no man would accept of any office of trust under government upon such conditions. And indeed it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf.

There is no doubt but the Crown will do ample justice to the plaintiff's demands, if they be well founded."

So, a captain of a troop is not *personally* liable for meat or forage supplied for his troop during his absence on duty, though ordered by his clerk, unless he actually receives the subsistence money from Government, or makes an absolute promise to be answerable *personally*.

Thus, in the case of *Myrle v. Beaver*, (b) which was an action of *assumpsit* for goods sold and delivered. The defendant was major

(b) 1 *East Rep.* 135.

Plaintiff

and captain of a troop in the *Hants* regiment of fencible cavalry. The defendant was a butcher of *Brighton*, where the troop was quartered. The action was brought to recover the value of meat furnished for the use of the troop between the 25th of *January* and the 22d of *February* 1800. Previous to the first mentioned period, the defendant had the command of his own troop, at *Brighton*, and had employed a serjeant in the troop, of the name of *Bedford*, to act as his clerk in providing for the subsistence of the troop, which it is the duty of the captain to do : and, under the defendant's orders, *Bedford* had from time to time given orders for and superintended the delivery of the meat ; and while the defendant remained with the troop, he had himself regularly paid the plaintiff his bill monthly ; and the account was admitted to be settled up to the 24th of *January*. At that period the defendant was detached with a small party to command at *Arundel*, about 20 miles off, the greatest part of the regiment remaining at *Brighton*, under the command of the colonel. On the defendant's departure, the actual command of his troop devolved upon Mr. *Hunt*, the first lieutenant, though they were still subject to the defendant's military orders, and all military reports and returns of the troop were made first to him, and from him to head quarters. After the defendant's departure from *Brighton*, serjeant *Bedford* received his orders from Lieutenant *Hunt* for the subsistence of the men, and received money from him for such purposes, and was employed by him, as he had before been by the defendant when he was present, to give orders for and superintend the delivery of the meat, which he did in the same manner as before ; but it did not appear that such change of his authority was made known to the plaintiff, who continued to supply meat as before. On the 20th of *February*, and before the usual time for settling the plaintiff's bill, Lieutenant *Hunt*, who, besides his command in the troop, was also paymaster of the regiment, absconded, without settling any of his regimental accounts, and leaving this demand, among others, unsatisfied. It appeared to be the course of the service, that a certain allowance is made by Government to the captain of every troop for the subsistence of the men, upon which he derives an allowed profit to himself, and to which he was still entitled during his absence on the detached command at *Arundel*. This subsistence money is issued every month from the agent of the regiment to the paymaster in advance, by whom it is paid over to the captains of troops, who draw upon the paymaster for it, at their pleasure. The agent of the regiment regulates the amount

of the monthly issue to the paymaster by the muster-rolls, and the bills which have before been sent in, and these are signed by the captain of the troop, while he is in the actual command; but during the period in question, in which the plaintiff's bill accrued, returns of this nature were signed by *Hunt*, and sent in to the pay-office: and this allowance was, in the course of the service, received by *Hunt*, but was not in fact paid over by him to the defendant during the period that he was in the actual command of the troop. The paymaster is recommended by the colonel of the regiment, and approved by the king, to whom he gives a bond to perform the duties of his office, and account faithfully, and to repay the surplus, if any, in his hands. For some days, at the latter end of *January* and beginning of *February*, the colonel was absent from the regiment, and during that time the principal command devolved upon the defendant, as major and next in seniority, who came over to and resided at *Brighton*, but *Hunt* still continued to have the actual command of the defendant's troop.

The Court said, "It is an undisputed fact that the defendant was not in the actual command of his troop during any period of the time when this demand accrued; but the command had devolved upon another officer, who was next in seniority. The defendant neither gave the orders for the provisions, nor had he any authority to do so. It is true that the serjeant acted at first by the defendant's orders; but he is not to be considered as the agent of a private individual; it was plain that he acted as agent for whatever officer happened to have the command of the troop. The defendant has never received any money from Government for this purpose; but the money was received by *Hunt*, who was next in command, as well as paymaster, and by whom it ought to have been paid over. So that on the whole there appears to be no ground for fixing the defendant with a liability in this case."

So, the captain of a troop for which forage was furnished by the orders of a clerk appointed by such captain, is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by Government, and upon whom the captain is entitled to draw

draw for a certain sum, regulated by the returns of the preceding month.

Thus, in the case of *Rice v. Chute*, (c) which was a similar action to the last; and the plaintiff's demand was for forage supplied by him at different times to the *Hampshire* fencible cavalry, at *Brighton*, from the 15th of *October* 1799 to *May* 1800, and the only question was, whether the defendant were liable for it? *Reed*, the quarter-master of the troop said, that he was appointed by the defendant to be clerk of the troop, at the salary of 10*l.* a year. He proved the amount of the oats delivered by the plaintiff to the use of the troop, and that the oats were delivered according to the orders of the defendant, as commanding officer of the troop, the same having been purchased by the witness by the express direction of the defendant; that *Hunt* was the paymaster of the troop for the last two years and a half; and that he, the witness, had paid the plaintiff several sums, by bills on the paymaster. The plaintiff received orders to draw bills on *Hunt*, and was paid at different times by him. The plaintiff and others who supplied the troop were to be paid monthly, but *Hunt* had not paid at all since *October* 1799. The drafts were of this sort: "27th of "*January* 1800. Two months after date pay *John Rice*, or "order, 316*l.* value in oats by *Alexander Reed*;" addressed to *W. Hunt*, Esq. and accepted by him. In the latter end of *October* 1799 the defendant was recruiting at *Basingstoke*, and came to *Brighton* on the 8th of *November* following. The defendant was in *Brighton* for three or four weeks, and was detached to *Arundel* in the *December* of the same year. About the 24th *January* the defendant returned, and staid at *Brighton* till his regiment was disbanded. *Hunt* was appointed paymaster in 1797, by the Commander in Chief. He had been slack in his payments for some time, and at last absconded; which was the occasion of the present suit. The witness had received orders from the defendant to draw bills on the paymaster, and on his agent too, which were paid. Evidence was also given of bills drawn by the defendant on the paymaster, in favour of various persons who had furnished articles for the troop. At *Brighton* the clerk drew bills as usual for defendant, and received money for a long time after the new regulation (in *July* 1797, as to the appointment of the paymasters) both from defendant and from the paymaster. The clerk ap-

(c) 1 *East Rep.* 579.

plied twice by letter to the defendant, at *Arundel* and *Brighton*, for money for the use of the troop. He also proved that *Hunt*, the paymaster, was indebted to the defendant in 40*l.*; and the regiment was indebted to *Hunt* in 700*l.*; that *Hunt's* credit was so bad that no person would have trusted him for 20*l.* Before the new regulation, the colonel appointed the paymaster, and the officers were liable for his deficiencies. By the new regulations the Commander in Chief appoints the paymaster, and the field officers and captains are no longer responsible. However, the same practice continued after as existed before this regulation, namely, that the captains of each troop drew on the paymaster bills for the pay, forage, and quarters of the troop. The two sureties for the paymaster, *Hunt*, were Colonel *Dacre* and Colonel *Everitt*. For the defendant it was proved, that on the 8th *October*, the defendant was recruiting at *Basingstoke*, and remained there till the 3d of *November* following. He was at *Brighton* on the 10th of *November*, and on the 24th of the same month; that from 1st of *December* to the 19th of *January* he was with a detachment at *Arundel*. He was there likewise on the 28th of *January*, and staid till 2d of *February*, and then had leave of absence. He was at *Brighton* on the 1st of *March*; that on the 20th of *February* *Hunt* absconded; that the lieutenant next in command, in the absence of the captain of the troop, signs the accounts and payments, and the pay-list containing the extra food to the horses. On that return the paymaster issues the money. The pay-list is the voucher of the last issue. There was a committee of paymasters, whereof the defendant was one, after the absconding of *Hunt*, who regulated the accounts.

The counsel for the plaintiff, admitting that there was no express undertaking for the payment, contended that he was entitled to recover on the count for money had and received; relying on the state of the paymaster's accounts, as proved by *Reed*. The learned Judge, however, directed the jury to find a verdict for the defendant, but they found a verdict for the plaintiff to the extent of his demand.

But the Court of King's Bench afterwards set aside this verdict, and granted a new trial. And Lord *Kenyon*, Ch. J. said, "I cannot conceive how the captain of a troop can be personally responsible for the forage furnished to the troop, whether he have received any money for that purpose or not. It is admitted the goods were not furnished upon his express undertaking. They were ordered by the clerk, who receives his orders from whatever
officer

officer happens to be in command at the time. But it is notorious to all parties that he does not contract as an individual, but on the behalf of Government: and Government, it appears, provides money for this very purpose, which is issued from time to time to the paymaster of the regiment. The parties who furnish the goods know that the money is not to come out of the pocket of the captain of the troop. Then the paymaster not having paid this money over to the defendant, how can we say that the money has been had and received by him to the plaintiff's use, when no money whatever has been received by the defendant. The consequence is, there must be a new trial."

But the reporter observes, that there was another case of *Rice v. Everitt*, (d) determined at the same time, which was an action brought by the same plaintiff against the colonel of the same regiment, for forage furnished to his own particular troop. The evidence was in general the same as in the other case: but here it appeared that though the defendant had not drawn upon the paymaster of the regiment for the particular sum in demand, and so he could not be said to have received that sum to the plaintiff's use, yet the defendant being indebted to the paymaster on the balance of his own private account with him to the amount of two-thirds of the plaintiff's demand, and being also surety for the paymaster to Government, and the paymaster having absconded in a state of insolvency, the Court refused to set aside a verdict recovered by the plaintiff for the amount of his debt, as the defendant was liable, in some shape or other, for the paymaster's default, and justice had upon the whole been done by the verdict.

(d) 1 *East Rep.* 583. a.

CHAPTER VI.

Of Contracts by Partners.

PARTNERSHIP is thus defined; *contractus societatis est, quo duo pluresque inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter singulos pro rata dividatur.* (a)

This definition of a partnership is said (b) to be good as between the parties themselves, but not with respect to the world at large; for in this view of a partnership, the question is generally, not between the parties whether money, goods, or labour were contributed, and in what proportion, but simply whether there be an agreement for a participation of profits? And upon this question it is observed, (c) that every man who has a share of the profits of a trade, ought also to bear his share of the loss; and if any one takes part of the profits, he takes a part of that fund, on which the creditor of the trader relies for his payment. It is intended to consider the subject of this chapter in the following order:

1. *What Agreement or Stipulation will constitute a Partnership, and thereby render all the Persons jointly interested therein liable to third Persons.*
2. *What Contracts, &c. made by one Partner shall bind himself and his Co-partner.*
3. *Of Contracts with a Partnership Firm after a Change or Dissolution; and of the Notice thereof necessary to be given.*
4. *How Partners must sue and be sued.*
5. *Of the Remedy by Partners upon Contracts, &c. Inter se.*

(a) *Puffendorf, lib. 5. cap. 8.* (b) *Per Eyre, Ch. J. in Waugh v. Carter, 2 H. Bl. 245.* (c) *Per De Grey, Ch. J. 2 Bl. Rep. 1000.*

1. *What Agreement or Stipulation will constitute a Partnership, and thereby render all the Persons jointly interested therein liable to third Persons.*

In order to constitute a partnership, so as to make a person liable as a partner, there must be some agreement between him and the ostensible person to share in the profits of a trade, or he must have permitted that other to use his credit, and to hold him out as one jointly answerable with himself.

Thus, in the case of *Wagh v. Carver* and others, (d) which was an action of *assumpsit* for goods sold and delivered, and for work and labour done, &c. A verdict was found for plaintiff, subject to the opinion of the court, on a case which stated, That on the 24th February 1790 articles of agreement were duly executed between *Erasmus Carver* and *William Carver* (two of the defendants) of the one part, and *Archibald Giesler* (the other defendant) of the other part, reciting, "Whereas the said *Archibald Giesler*, some time since, received appointments from several of the principal ship-owners, merchants and insurers in *Holland*, and other places, to act as their agent in the several counties of *Hampshire*, *Devonshire*, *Dorsetshire*, and *Cornwall*; and whereas the said *Erasmus Carver* and *William Carver* have, for a great number of years, been established at *Gosport* in the agency line, under the firm of *Erasmus Carver and Son*, and hold sundry appointments as consuls and agents for the *Danish* and other foreign nations, and also have very extensive connexions in *Holland*, and other parts of *Europe*; and whereas it is deemed for their mutual interest, and the advantage of their friends, that the said *Archibald Giesler* should remove from *Plymouth*, and establish himself at *Cowes* in the *Isle of Wight*; and the said *Erasmus Carver* and *William Carver* and the said *Archibald Giesler* have agreed, that each should allow to the other certain portions of each others commissions and profits, in manner hereafter more particularly mentioned and expressed; now therefore this agreement witnesseth, and the said *Archibald Giesler* doth hereby for himself, his executors and

(d) 2 H. BL 235.

"administrators,

“ administrators, covenant promise and agree, to and with the said
“ *Erasmus Carver* and *William Carver*, their executors and assigns
“ in manner following, (that is to say), that the said *Archibald*
“ *Giesler* shall and will, when required so to do, by the said *Eraf-*
“ *mus Carver* and *William Carver*, remove from *Plymouth*, and
“ establish himself at *Cowes* aforesaid, for the purpose of carry-
“ ing on a house there in the agency line, on his account; but in
“ consequence of the assistance and recommendations which the
“ said *Erasmus Carver* and *William Carver* have agreed to render
“ in support of the said house at *Cowes*, the said *Archibald Giesler*
“ doth covenant promise and agree to and with the said *Erasmus*
“ *Carver* and *William Carver*, that the said *Archibald Giesler*, his
“ executors, administrators, and assigns, shall and will well and
“ truly pay or allow, or cause to be paid or allowed to the said
“ *Erasmus Carver* and *William Carver*, their executors, adminis-
“ trators, or assigns, one full moiety or half part of the commission
“ agency, to be received on all such ships or vessels, as may arrive
“ or put into the port of *Cowes*, or remain in the road to the
“ *Westward* thereof, within the *Needles*, of which the said *Archi-*
“ *bald Giesler* may procure the address, and likewise one full moiety
“ or half part of the discount on the bills of the several tradesmen,
“ employed in the repairs of such ships or vessels. And the said
“ *Archibald Giesler* hath also covenant, promise, and agree, to and
“ with the said *Erasmus Carver* and *William Carver*, that they the
“ said *Erasmus Carver* and *William Carver*, shall be at full liberty
“ to engage warehouses at *Cowes* aforesaid, on such terms and in
“ such manner, as they may think proper, in which the said *Archi-*
“ *bald Giesler* shall not upon any grounds or pretence whatsoever,
“ either directly or indirectly interfere. And the said *Erasmus*
“ *Carver* and *William Carver*, for the considerations hereinbefore
“ mentioned, do hereby covenant promise and agree, to and with the
“ said *Archibald Giesler*, his executors, and administrators, that they
“ the said *Erasmus Carver* and *William Carver* shall and will well and
“ truly, pay or allow, or cause to be paid or allowed, to the said *Archi-*
“ *bald Giesler*, his executors, administrators, or assigns, three-fifth
“ parts or shares of the commission or agency to be received by the said
“ *Erasmus Carver* and *William*, on account of all ships and vessels,
“ the commanders whereof may in consequence of the endeavours, inter-
“ ference, or influence of the said *Archibald Giesler*, proceed from
“ *Cowes* to *Portsmouth*, and there put themselves under the direction
“ of the said *Erasmus Carver* and *William Carver*, in manner herein
before

" before mentioned, and likewise one and one-half per cent. on the
 " amount of the bills of the several tradesmen employed in the repairs of
 " such ships or vessels, together with one-fourth part of such sum or
 " sums, as may be charged or brought into account for warehouse-rent,
 " on the cargoes of such ships or vessels respectively; and also one-sixth
 " part of such sum or sums as may be charged or brought into ac-
 " count, for warehouse-rent on the cargoes of ships or vessels, as may be
 " landed at Cowes aforesaid. And also that they, the said Erasmus
 " Carver and William Carver, their executors, administrators, or
 " assigns, shall and will, well and truly, pay or allow, or cause to be
 " paid and allowed, unto the said Archibald Giesler, his executors,
 " administrators, or assigns, one fourth part as share of the commission
 " or agency to be received by the said Erasmus Carver and William
 " Carver, on account of all such ships or vessels that may arrive or put
 " into the port of Portsmouth, or remain in the limits thereof, under
 " the care and direction of the said Erasmus Carver and William
 " Carver; and likewise one-half per cent. on the amount of the bills of
 " the several tradesmen employed in the repairs of such ships or
 " vessels.

" And it is hereby likewise covenanted, declared, and agreed, by
 " and between the said Erasmus Carver and William Carver, and
 " the said Archibald Giesler that each party shall separately run the
 " risque of, and sustain all such loss and losses, as may happen on the
 " advance of monies, in respect of any ships or vessels, under the
 " immediate care of either of the said parties respectively; it be-
 " ing the true intent and meaning of these presents, and of the par-
 " ties hereunto, that neither of them, the said Erasmus Carver and
 " William Carver and Archibald Giesler shall at any time or times
 " during the continuance of this agreement, be in anywise injured, pre-
 " judiced, or affected, by any loss or losses that may happen to the other of
 " them, or that either of them shall in any degree be answerable or ac-
 " countable, for the acts, deeds, or receipts, of the other of them, but
 " that each of them, the said Erasmus Carver and William Carver,
 " and Archibald Giesler, shall in his own person, and with his own
 " goods and effects, respectively, be answerable and accountable for his
 " own losses, acts, deeds, and receipts.

" Provided always, nevertheless, and it is hereby declared and
 " agreed to be the true intent and meaning of these presents, and
 " the parties hereunto, that the foregoing articles shall not, nor
 " shall be construed to bear reference to their particular, or separate
 " mercantile concerns or connections."

In pursuance of these articles *Giest* removed from *Plymouth*, and settled at *Cowes*, where he carried on the business of a ship-agent, in his own name, and contracted for the goods, &c. which were the subject of the action. And the question was, whether the defendants were partners on the true construction of the articles?

The case was argued twice at the bar: and the Court, after taking time to consider of their judgment, determined that the defendants were partners; and consequently jointly liable for the debt in question.

Lord Chief Justice *Eyre*, said: "The discussion of this case has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking-house, to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence.

The definition of a partnership, cited from *Puffendorf*, is good, as between the parties themselves, but not with respect to the world at large. If the question were between A. and B. whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labour, and on what agreement they were to divide the profits of that contribution. But in all these cases, a very different question arises, in which that definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds? Now a case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone

into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less, with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the *Carvers* and *Giesler*, that they were not, nor ever meant to be partners. They meant each house to carry on trade without risque of each other, and to be at their own loss. Though there was a certain degree of controul at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not by parts of their agreement, constituted themselves partners in respect to other persons. The case therefore is reduced to the single point, whether the *Carvers* did not intitle themselves, and did not mean to take a moiety of the profits of *Giesler's* house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done, is clear upon the face of the agreement: and upon the authority of *Grace v. Smith*,^(c) he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason. I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risque of profit and loss: a ship-agent employs tradesmen to furnish necessaries for the ship, he contracts with them, and is liable to them, he also makes out their bills in such a way as to determine the charge of commission to the ship owners. With respect to the commission, indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risque of profit and loss, to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him, as well as to the owners. If therefore the principle be true, that he who takes the

(c) *Page* 291.

general profits of a partnership, must of necessity be made liable to the losses, in order that he may stand in a just situation, with regard to the creditors of the house, then this is a case clear of all difficulty. For though with respect to each other, these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff."

So, in the case of *Bloxam and Fourdrinier v. Pell and Brooke*, (f) where it appeared there was a partnership for seven years between *Brooke* and *Pell*; but at the end of one year agreed to be dissolved, but no express dissolution was had. The agreement recited, that *Brooke* being desirous to have the profits of the trade to himself, and *Pell* being desirous to relinquish his right to the trade and profits, it was agreed, that *Brooke* should give *Pell* a bond for 2485*l.* which *Pell* had brought into the trade, with interest at five per cent. which was accordingly done. And it was farther agreed, that *Brooke* should pay to *Pell* 200*l.* per annum for six years, if *Brooke* so long lived, as in lieu of the profits of the trade; and *Brooke* covenanted, that *Pell* should have free liberty to inspect his books. *Brooke* became a bankrupt before any thing was paid to *Pell*. And this action being brought for a debt incurred by *Brooke* in the course of trade, Lord Mansfield held that *Pell* was a secret partner: He said, "This was a device to make more than legal interest of money, and if it was not a partnership, it was a crime. And it shall not lie in the defendant *Pell*'s mouth to say, it is usury, and not a partnership."

But where a partner (who retires from the concern) lends money to his co-partner, upon an agreement to allow legal interest, with an additional annuity for a certain term of years; this is not a continuance of the partnership, even with respect to third persons, provided there has been public notice of the dissolution.

Thus, in the case of *Grace v. Smith*, (g) which was an action of *assumpsit* for goods sold and delivered. On the trial a verdict was found for the defendant: and upon a motion to set aside this verdict, De Grey, Ch. J. reported, that this was an action brought against *Smith* alone, as a secret partner with one *Robinson* to whom

(f) *Sittings in the King's Bench*, 7 Mar. 1775. coram Lord Mansfield, cited in 2 Bl. Rep. 999.

(g) 2 Bl. Rep. 998.

the goods were delivered, and who became bankrupt in 1770. That on the 30th of *March*, 1767, *Smith* and *Robinson* entered into partnership for seven years, but in the *November* afterwards some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the public on the 17th of *November*, 1767. The terms of the dissolution were, that all the stock in trade, and debts due to the partnership should be carried to the account of *Robinson* only. That *Smith* was to have back 5200*l.*, which he brought into the trade, and 1000*l.* for the profits then accrued, since the commencement of the partnership: That *Smith* was to lend *Robinson* 4000*l.*, part of this 5200*l.*, or let it remain in his hands for seven years, at five *per cent.* interest, and an annuity of 300*l.*, *per annum*, for the same seven years: For all which *Robinson* gave bond to *Smith*. In *June* 1768, *Robinson* advanced to *Smith* 600*l.* for two years' payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times, to enable him to pay the partnership debts, *Smith* having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of *Robinson*. That on the 1st of *August*, 1768, the demands of *Smith* were all liquidated and consolidated into one, *viz.* 5200*l.*, due to him on the dissolution of the partnership, 1500*l.* for the remaining five years of the annuity, and 300*l.* for *Smith's* share of a ship: in all 7,000*l.* for which *Robinson* gave a bond to *Smith*. That on the 22d of *August*, 1769, an assignment was made of all *Robinson's* effects to secure the balance then due to *Smith*, which was stated to be 10,000*l.* Soon after the commission was awarded.

The Court of *Common Pleas* held, that these facts did not amount to a partnership. *De Grey*, Ch. J. said: "The only question is, what constitutes a secret partner? every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo*, or left behind in trade by one of the partners who retires. And, whether the terms

of

of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to inquire whether *Smith* agreed to share the profits of the trade with *Robinson*, or whether he only relied on those profits, as a fund of payment: A distinction, not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial."

Blackstone, J. said: "I think the true criterion, when money is advanced to a trader, is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a *loan*, (whether usurious or not, is not material to the present question), in the latter a *partnership*. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, and all the debts contracted in the trade, to any amount."

So, a partner whose name does not appear in the firm, nor is publicly known to be a partner, is only liable for goods furnished during the time he is actually a partner, and receiving the emoluments and profits of the business. (*b*)

But if he has been known publicly to be a partner, and no notice is given of the *dissolution*, in that case he will be liable for debts after he has actually withdrawn himself from the concern. (*i*)

So, if a person suffers his name to be used in a business, and holds himself out as a partner, though in point of fact no partnership exists, he is liable to a creditor who contracts with the firm.

Thus, in the case of *Young v. Axtell* and another, (*k*) which was an action to recover 600*l.* and upwards, for coals sold and delivered by the plaintiff a coal-merchant. An agreement between the defendants was given in evidence, stating that the defendant *Mrs. Axtell* had lately carried on the coal-trade, and that the other defendant did the same; that *Mrs. Axtell* was to bring what customers she could, into the business, and that the other was to pay her an annuity, and also 2*s.* for every chaldron that should be sold to these

(*b*) *Evans v. Drummond*, 4 *Esp. Rep.* 89.

(*i*) *Vide Post.*

(*k*) At Guildhall Sittings after Hil. 24 Geo. III. cor. Lord Mansfield, cited in 2 *H. Bl.* 242.

persons who had been her customers, or were of her recommending. The plaintiff also proved, that bills were made out for goods sold to her customers, in their joint names; and the question was whether Mrs. Astell was liable for this debt? Lord Mansfield, said, "He should have rather thought on the agreement only, that Mrs. Astell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she has suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." And the jury accordingly found a verdict for the plaintiff.

A partnership may exist in a particular concern without constituting a general partnership, unless a representation is made of a general partnership.

Thus, in the case of *De Berkom v. Smith and Lewis*, (1) which was an action of *assumpsit* to recover the value of a quantity of foreign lace against the defendants, charging them as partners. It was admitted that *Smith*, one of the defendants, was liable, but the other defendant, *Lewis*, denied that he was a partner. This was the only question in the case. The evidence on the part of the plaintiff was, that he was a foreigner living at *Lisle* in *Flanders*; that having been applied to by the defendants for a quantity of lace on credit, that before he would furnish it, he wrote over to his correspondent in *London* to inquire concerning ^{their} circumstances and situation; that his correspondent had inquired from a Mr. *Botbam*, a merchant in *London*, who informed him that they were in partnership in trade, which information the correspondent communicated to the plaintiff, who in consequence thereof gave them the goods on the terms they asked.

Mr. *Botbam's* clerk was called, and proved, that the only connexion in trade between Mr. *Botbam* and the defendants, was in discounting bills, which Mr. *Botbam* had been in the habit of doing for *Smith*, one of the defendants, but that on discounting a bill at one time for *Smith*, he had introduced *Lewis* to him as his partner.

(1) 1 Esp. Rep. 29.

Lord *Kenyon*, Ch. J. upon this evidence, ruled, "That it was not sufficient to charge *Lewis* as a partner." His lordship said, "That persons might be partners in a particular concern or business, but that, notwithstanding if they did not appear to the world as partners, that it should not be sufficient to constitute a general partnership, and make them liable in other cases not connected with such particular business. That the circumstance in evidence of the introduction of *Lewis* to Mr. *Botham* should be taken *secundum subjectam materiam*, that is, as applying to the transaction in which *Smith* was concerned with Mr. *Botham*, the discounting of bills, to which transaction only it should be confined, and that he was therefore of opinion, that without further evidence a general partnership could not be established, in order to charge *Lewis* the other defendant in this action."

However, it afterwards appearing in evidence, that in fact, *Lewis* had represented himself to the plaintiff as partner in trade with *Smith*; his lordship in his charge to the jury added, "That though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, that both shall be liable." The plaintiff upon this evidence obtained a verdict.

*Verdict
for plaintiff
ante 293*

In order, however, to constitute a partnership in a particular purchase there must either be a joint undertaking to pay, or an agreement to share in the profit and loss.

Thus, in the case of *Hoare and others v. Doves* and another, (m) which was an action for money lent and advanced. The facts of the case appeared to be as follow: The plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the *East India Company* to *Contencin*, a broker, who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea, at the *East India Company's* sale, of which they, (together with himself,) were to have separate shares, the lots being, in general, too large for any one dealer. The practice at such sales is, for the company to give a warrant or warrants to the broker or purchaser, for the delivery of the quantity of

(m) *Doug.* 371.

tea purchased, on payment being made. At the time of the sale 25*l.* *per cent.* is advanced, and is forfeited unless the whole is paid on the *third*, which is the *last*, day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally considerably less than the supposed value of the tea. It happened, however, in this instance, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the *India House*, that the value of the tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead, or become bankrupts. The shares of the defendants were to be two-sixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two-sixteenths. There was not any joint concern in the re-disposal of the tea. The defendant produced several bankers and brokers, (of whom *Contencin* was one,) who said, they had had frequent transactions of this sort, (it being a very usual speculation,) and they always understood, that the only security was the pledge, and the personal security of the broker, unless where the principals were inquired after, and declared, which was very rarely done. That, as the practice was to advance considerably under the supposed value of the tea, and it was also usual to stipulate, that, if the money was not repaid within a certain time, the lender might sell, the warrant was of itself a general and sufficient security. *Contencin* said, that tea-warrants were considered as cash, and passed by delivery. On the other side, *in answer to this evidence*, (the plaintiffs having, at first, rested their case on the fact, that there were persons behind the curtain, for whom the broker acted,) two witnesses were called: One of them, one *Cartony*, a tea-dealer, swore, that a broker had once borrowed some money *for him* on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the sum advanced, and the broker having failed, he had paid the difference, considering himself as liable. The other was a person who had also dealt in tea and in loans of this sort, and he swore, that his idea had always been that the persons behind the curtain were liable; but, upon cross examination, he said, he never knew any loss happen, nor any demand actually made, on the broker's employers.

The

The Court of *King's Bench*, upon these facts being stated, were of opinion that they did not constitute a partnership.

Lord *Mansfield* said: "I considered this, at first, as a case of dormant partners. The law with respect to them, is not disputed, viz. that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but, towards the end of the cause, the nature of the transaction, and of these loans, was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. The evidence of *Cartony* is irrelevant, because he said the broker borrowed the money for him; and, besides, he did not dispute the demand. Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement, to share with one another in the profits and loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered as cash, and pass by delivery, like *East India* bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference, whether specific tea, or the warrants, are delivered at the sale. It would be most dangerous if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hac in fadera veni*. The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said, the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals; they did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them."

Buller, J. said: "This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner. Nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it
in

in his power to make 500 persons partners, who had never seen nor heard of one another, or might, at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants."

So, where one person agrees to buy a quantity of goods, and to let others have a certain proportion of them, he alone is answerable; such a transaction being considered a mere *sub-contract*, and not a *partnership*.

Thus, in the case of *Coope and others v. Eyre and others*, (n) which was an action of *assumpsit*, brought by the plaintiffs as owners of a *Greenland* ship, called the *Earl of Chatham*, against the defendants, as partners, on an agreement to purchase oil, the cargo of a ship. It appeared that on the 24th *August*, the defendants, *Eyre*, for himself and partners, (who were *Atkinson* and *Walton*, general merchants) *Hatterley*, for himself and *Stephens*, who were oil merchants, and *Pugh*, for himself and son, who were also oil-merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise; that *Eyre* should be the ostensible buyer, and the others *share in his purchase at the same price which he might give*. *Hatterley* and Co. were to have one-fourth, *Pugh* one-fourth, and *Eyre* and Co. the remaining moiety; that they bought large quantities of oil belonging to other ships and other traders besides the plaintiffs, in the name of *Eyre* and Co.; that *Hatterley* and *Pugh* occasionally came forwards, and gave directions as to the delivery of the oils, and otherwise interfered in the transaction, and also made many declarations, "that they were all jointly interested in the different purchases, and that there was a general concern between them."

The evidence as to this point was in substance as follows: *Garforth*, the broker, proved the contract, signed by *Eyre*, for himself and Co.; general orders from *Eyre* only to purchase any quantity of oil which might offer. *Hatterley* and *Pugh* told him they were to have a *part* of what was purchased in the firm of *Eyre* and Co., and that they were *jointly* concerned. They went to receive a cargo sold by *Thwaites*, at *Blackwall*. *Thwaites*, who had also sold oil to the defendants, proved that *Hatterley*, said "*It is all the same whether Eyre or I buy it; it is the same concern*;" and that

(n) 1 H. Bl. 37.

Pugh said, "*Hattersley* and I am concerned;" that they attended to see the oil gauged: *Strickland*, who had the care of *Greenland* dock, proved that *Hattersley* and *Pugh* said, "We have purchased your oil;" that on failure of *Eyre* and Co. *Pugh* sent an order not to deliver the oil of the ship *Britannia*, which had been purchased by *Eyre* and Co., and had the cellars locked.

Kilbington sold oil to *Eyre* and Co. by *Garforth* the broker, delivered to *Hattersley*, who gave in payment a bill accepted by *Eyre* and Co., and his own note, to indemnify the witness in making an indorsement.

Captain *Hastings* sold oil to *Eyre* and Co. by the same broker, for which *Pugh* signed an agreement.

Captain *Doufen* also sold oil by *Garforth* to *Eyre* and Co., for which *Pugh* gave a receipt; and being asked, whether the buyers were responsible persons, told the witness that he was safe, saying, "I am concerned, *Hattersley* is concerned, and there is a house at *Norwich* which can buy us all." *Pugh* afterwards repeated this in the presence of *Hattersley*, who acknowledged it to be true.

Phelps proved that he was agent to sell oil for a Mr. *Neomans*, and not trusting to *Eyre* only, whom he considered as a mere speculator, required the names of the others concerned to be given in, upon which *Garforth* the broker gave in the names of *Hattersley* and Co.

At the trial, on the part of the defendants, it was insisted that the contract for sale was made between the plaintiffs and *Eyre* and Co. only, and that the agreement which the defendants entered into between themselves was only a sub-contract, and did not constitute a partnership. Lord *Loughborough*, Ch. J., after declaring his opinion, (that as the defendants did not appear to have been jointly concerned, further than the purchase of the oil, they had not such a joint interest in the profits and loss as the law made necessary to a partnership,) directed a verdict to be found for them, which was accordingly done.

But the plaintiffs' counsel afterwards moved for a rule to show cause why a new trial should not be granted. In support of the rule they admitted that a participation of profit and loss was necessary to constitute a partnership, and argued that this was a contract of that nature. Whether the agreement be to divide the goods themselves at a given time, or the produce on the sale of them, each party runs the same risk, and each has his share of profits

its and loss, either in the increased or decreased value of the goods, or the increased or decreased price for which they might actually be sold.

The defendants *Hattersley* and *Pugh*, occasionally permitted their names and credit to be used, and holden out as persons jointly concerned: neither of them could say, "*Non hac in fœdera veni.*" While the speculation promised well, and they feared that the whole profit would belong to the assignees of *Eyre* and *Co.*, they went to *Greenland Dock*, to secure to themselves their respective shares of the concern. This was holding themselves out as jointly concerned in some of the contracts: but if they were concerned in some, they were so in all, as they were all made under the same order. It was known that *Eyre* had several other persons concerned with him, otherwise he could not have gained credit to so large an amount; but it was not necessary that the vendors should know who the private partners were: they gave credit to them, though not by name. The broker would not have made a bargain which could not be fulfilled; he knew that he was acting for responsible persons. But it shall not be in their power, after three months have elapsed, by their own act, to convert a partnership into a mere agreement. In the case of *Rich v. Coe*, † the owners of a ship, let for a term of years to the master, who covenanted to repair her at his sole expence, were held liable for repairs, though the ship-builders supposed the master to be the owner, and gave credit only to him. The firm of a house may have a different meaning, according to the nature of the trade. *Eyre* and *Co.*, as general merchants, might mean *Eyre*, *Atkinson*, and *Walton*; but in the oil-trade (which was known to be an extraordinary concern) *Eyre* and *Co.* meant *Eyre* and the other defendants, because they were all concerned together in the oil contracts. It is objected that this is not a partnership, but only a *sub-sale*, or *sub-contract*. A *sub-contract* is a secondary contract depending upon some primary and antecedent one. In the case of a purchase of goods, it means a *subsequent agreement* to take a part of what has been *previously bought*; it is like an *under-lease* of lands. But a previous agreement to share in an intended purchase, is a contract of *partnership*. So, if before a lease was granted, the intended lessee were to agree to let another have a *share in the concern*, that could not be regarded as a *sub-contract*, the person sharing would in such case be deemed a co-lessee in equity, and would be liable to the rent and covenants; for *qui*

† *Pag. tit. Owners and Masters of Ships.*

sentit commodum sentire debet et onus. It could not be a sub-sale to *Hattersley* and *Pugh*, because each was to have a share on the same terms as *Eyre* and Co. purchased. But *Eyre* and Co. were merchants, and merchants never buy to sell again at *prime cost*. *Hattersley* and *Pugh* must therefore be said to have shared originally in these bargains, and not to have purchased any second part of them. The spirit of buying and selling is gain; the spirit of partnership is mutual participation of gain.

The Court not being unanimous on this case, the Judges delivered their opinions *seriatim* as follow :

Gould, J. said, " The facts of the present case are shortly these: the defendants and *Eyre* and Co. order one *Garforth*, a broker, to buy quantities of oil. The defendants, *Hattersley* and Co., and *Pugh* and Co., were to have, for their respective shares, each one fourth. The broker buys divers ship loads; and to some of the vendors the defendants, during the treaty, declare it to be a common concern between them and *Eyre* and Co., in whose names the purchases were made.

But with respect to the plaintiffs; the purchase was made singly in the name of *Eyre* and Co., without any notification that the defendants had any concern in it.

These purchases were made on speculation, there being a prospect that oil would rise in price; but it afterwards fell; and then the defendants contend that they are not liable to make good the difference, *Eyre* and Co. having failed.

Upon these facts two questions arise; 1st, Whether the defendants are partners with *Eyre* and Co.? 2d, If not, whether they are to be deemed joint contractors in the purchase for *Eyre* and Co., and so liable for the whole?

As to the first, I think they cannot be considered as partners with *Eyre* and Co. in this purchase from the plaintiffs: although there may be partnerships in many other instances besides what are merely commercial, as in the case of farms rented by several persons jointly, and of partnerships of attorneys, and the like, yet I think the true criterion is as stated by Mr. J. *Blackstone* in the case of *Grace* and *Smith*,* " whether they are concerned in profit and " loss?" and the same doctrine is in effect held by Chief Justice *De Grey* in that case.

But in the present case there was no communication between the buyers as to profit or loss. Each party was to have a distinct

* *Ante* 291.

share of the whole, the one to have no interference with the share of the other, but each to manage his share as he judged best. The profit or loss of the one, might be more or less than that of the other.

In this light I am of opinion there is no foundation for the Court to adjudge the present case a partnership; and the jury having found for the defendants, that there is no reason to disturb the verdict.

2d, Whether they can be considered as joint purchasers.

I think it would be attended with great inconvenience in the common dealings between man and man to admit that position. The stipulation is, that the purchase should be made as for *Eyre* and Co., in the total, and each is to have a separate and distinct part. A man goes into *Yorkshire* to buy as many horses as he can collect, or a limited number, and agrees with a friend that he shall have two. It surely cannot be contended that this could make the friend a joint contractor, to subject him, in failure of the other, to pay for the whole bargain.

So, in a familiar case, a man is about to buy a tun of wine, and agrees that a friend shall have a hoghead.

And I think the case of *Hoare* and *Dawes* (o) is strong on this head: I need not state the case, it having been already stated several times.

Lord *Mansfield* holds it merely "an undertaking with the broker by each for a particular quantity; no undertaking by one to advance money for the other, nor to share with one another in profit or loss. It would be most dangerous if the credit of a person who engages for a 40th part, (for instance) should be considered as bound for the 39 others."

This doctrine falls in exactly with my ideas. I think cases of this nature should stand on broad lines, not on subtilties and refinements, the source of litigation and disputes."

Heath, J. "The question for the determination of the Court is, whether the contract made with the plaintiffs is so far binding on the defendants, *Pugh*, *Hattersley* and *Stephens*, as to make them liable on the failure of *Eyre* and Co.?"

If this contract may be considered independently of the other contracts given in evidence, there could be little doubt. *Eyre* and Co. employ *Garforth*, their broker, to buy oil, and it is agreed that the other defendants shall have aliquot parts when the commodity is purchased.

This is a sub-contract. By a sub-contract I mean a contract subordinate to another contract, made or intended to be made, between the contracting parties on one part, or some of them and a stranger. *Eyre and Co.* are the only purchasers known to the plaintiffs; entire credit was given to them alone. *Pugh, Hattersley,* and *Stephens* can be liable only in the event of a concealed partnership, on this principle, "that the act of one partner binds all his co-partners, on account of the communion of profit and loss." In truth, they were not partners, inasmuch as they were only interested in the purchase of the commodity, and not in the subsequent disposition of it.

Great reliance has been placed on this being a joint concern, and a joint speculation. It is so between the defendants, but the contracts made with the other vendors are different. A contract made between A. and B. cannot be given in evidence to explain a contract made between A. and C. It is *res inter alios acta*. In fact, the defendants have pledged themselves explicitly with other persons in a different manner. The contracts made with other merchants are not admissible evidence in this cause, except to prove a fraud, if the facts had gone that length; namely, that the house of *Eyre and Co.*, as a failing house, was to stand forwards, in order to protect the other defendants, who, by such means, might have the benefit of the speculation, if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence has been adduced; on the contrary, it appears that the objection made by the other vendors to the firm of *Eyre and Co.* was, "that they were unknown, and new in the trade."

If *Pugh, Hattersley,* and *Stephens* had authorized the broker to purchase aliquot shares for them, this case would have resembled that of *Hoare v. Dawes*, the doctrine of which is confirmed by a passage in the Digest, lib. 17. tit. 2. *pro socio*, l. 33. "*qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod, a societate longè remotum est.*"

No detriment from this decision can arise to trade, or affect the credit of merchants; for it behoves every contracting party to consider the responsibility of the persons with whom he contracts, and he has also the resource of a dormant partnership, if any such exist and can be proved. For these reasons I am of opinion that the rule ought to be discharged."

Wilson, J. "I am so unfortunate as to differ in opinion from the rest of the Court on the present question.

The contract was actually made between the plaintiffs and *Eyre* and Co.; but if the other defendants were jointly concerned in it, they ought to be responsible, as much as if they had personally contracted. That they were so concerned, sufficiently appears from the contracts with the other merchants, and their own declarations. These, I think, were proper to be given in evidence, being against themselves, to which evidence the verdict was contrary.

The defendants were all concerned in a general speculation: there was an original agreement between them to purchase as much oil as they could procure. Of what nature that agreement was there is no evidence precisely to prove, no witness having been present when it was concluded. It might have been such as would have made them jointly answerable, or it might not. How then are we to collect what it was? surely from the declarations of the parties themselves.

Thwaites's evidence proves that *Hattersley* said, "it is all the same whether *Eyre* or I buy it; it is the same concern." This shows it was not a sub-contract. If *Hattersley* had bought the oil himself, he would have been a contractor with *Thwaites*; and when he who knew what the agreement was between the defendants, declares it to be the same thing whether he or *Eyre* bought it, he puts himself expressly in the place of an original contractor; the Court then cannot say that he was a sub-contractor. This declaration was before the purchase of the cargo of the Earl of *Chatham*, on which the action is brought.

Kilbington, the keeper of *Greenland-dock* proved that *Hattersley* and *Pugh* both said to him, "we have purchased your oil." This was a direct avowal of their having jointly contracted, which was not done with a view to strengthen the credit of *Eyre* and Co., being after the purchase was made.

When Captain *Dowson* expressed some doubts whether *Eyre* and Co., to whom he had also sold his oil, were able to pay him, *Pugh*, who received it, told him, "you are safe," and declared that *he* was concerned, and *Hattersley* was concerned, and a house at *Norwich* who could buy them all. Now if they were sub-contractors, this declaration was not true; how could their sub-contract make the vendor safe? Here then is clearly a direct acknowledgment of their being original contractors. The evidence also of the broker
shows

shows that they all originally contracted : he delivered accounts to them, and informed *Hattersley* and *Pugh* how matters went on. In one instance he was so conscious of their being jointly concerned, that he gave in their names as such to the agent of Yeomans, who would not otherwise have given credit to the name of *Eyre* and Co.

“ Upon failure of *Eyre* and Co., *Hattersley* and *Pugh* gave orders to the keeper of the docks not to give up the oil remaining in the dock in the name of *Eyre* and Co., and took it as their own. Now they could have had no right to do this, if they had been only sub-contractors. Admitting that, after goods are delivered, there cannot be such a participation of profit and loss as will make a partnership, unless the parties originally contracted ; yet their dividing the goods, and each taking his share, after delivery, will be good evidence of an original contract. Whether the contract were joint or separate, nothing done subsequent can alter the nature of it, but there may be subsequent evidence to prove of what nature it was.

“ It has been said that as the credit was given to *Eyre* and Co. only, the vendors could not be injured if *Eyre* and Co. only were liable. But this argument goes to prove that no dormant partner would be answerable for the acts of the ostensible agent. I am therefore of opinion that a new trial ought to be granted.”

Lord *Loughborough*, Ch. J. said, “ The first impression on my mind was against the defendants, but in the course of the trial my opinion changed, and I thought they were not liable as partners : I still continue to think so, and consequently that the verdict was proper.

This being an action on a contract of sale, the vendor can have no remedy against a person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It has been justly observed, that a secret partnership can be no consideration to the vendor ; though, for reasons of policy and general expedience, the law is positive with respect to the secret partner, that when discovered, he shall be liable to the whole extent. In many parts of *Europe* limited partnerships are admitted, provided they be entered on a register ; but the law of *England* is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profits and loss

is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. The late case of the cotton purchase resembled the present, so far as the several parties were each to take aliquot shares; but there, no part of the commodity was to be re-sold, without the consent of all concerned. Here *Eyre* was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may, by other purchases, have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them necessary to make them partners; their agreement was a sub-contract; which, as my brother *Heath* observed, may be executory; it was to share in a purchase to be made. The seller looked to no other security but *Eyre* and Co. to them the credit was given, and they only were liable."

So, where several persons agreed to make an out-fit, and each adventurer was to purchase a quantity of goods, and bring it into the common stock, the price of a parcel of goods so bought was held an individual debt, which could not be recovered from the other adventurers. (p)

But, a contract made by two partners to pay a certain sum of money to a third person equally out of their own *private cash*, is a *joint contract*, and they must be *jointly* sued upon it. (q)

So, in another case, (r) where A. having neither money nor credit, offers to B. that if he will order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. *should have half for his trouble*; B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone; it was holden that he was entitled to recover back such payment in *assumpsit* against A., who had not accounted to him for the profits.

(p) *Saville v. Robertson*, 4 Term Rep. 720.

(q) *Byers v. Dobey*, 1 H. Bl. 236.

(r) *Hesketh v. Blanchard* and another, executors of *Robertson*, 4 East. Rep. 144.

Lord *Ellenborough*, Ch. J. said: "The distinction taken in *Wagh v. Carver* and others, * applies to this case. *Quod* third persons it was a partnership; for the plaintiff was to share half the profits. But as between themselves it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending *Robertson* his credit."

Where two persons jointly carry on business as partners, but one only appears, and is known in the concern, and is permitted to represent himself to the world as a sole trader, that one shall not be allowed to set up partnership as a defence to an action brought against him only.

Thus, in the case of *Stray, Ross, and others, v. Deery*, (s) which was an action of *assumpsit* for goods sold: pleas, *non assumpsit* and a set-off. The plaintiffs jointly carried on trade as grocers, but *Ross* was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership *Ross* was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy broker, and being indebted for grocery (as he conceived) to *Ross*, he effected insurances, and paid premiums on account of *Ross* solely, to the amount of his debt, under the idea that one demand might be set off against the other. *Ross's* affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refused by him upon the ground of his having been deceived by the other partners keeping back and holding out *Ross* as the only person concerned in the trade. Lord *Kenyon*, Ch. J. was of opinion, that as the defendant had a good defence by way of set-off, as against *Ross*, and had been by the conduct of the plaintiffs led to believe that *Ross*, was the only person he contracted with, they could not now pull off the mask and claim payment of debts supposed to be due to *Ross* alone, without allowing the parties the same advantages and equities in their defence that they would have had in actions brought by *Ross*.

* *Ante* 286. (s) *At Guildhall, Sittings after Mich. Term. 1789. Coram. Lord Kenyon, 7 Term Rep. 361. n. c.*

*2. What Contracts, &c. made by one Partner
shall bind himself and his Co-partner.*

If one of several partners draws, accepts, or indorses a bill or note, or enters into any other contract not under seal, in the name of the partnership firm, for any thing relating to the joint concern, all the partners are bound by it, and liable to the persons with whom the obligation is made, if he has acted *bona fide*. The same liability may also, in some instances, be incurred upon a bill or other negotiable instrument given by one partner in the name of the partnership firm for his own *separate* debt or concern.

Thus, in the case of *Swan and others v. Steele, Clerk, and Wood*,⁽¹⁾ which was an action of *assumpsit*, wherein the plaintiffs declared, first, on a bill of exchange, dated 26th of *August*, 1803, drawn by *D. Maitland on Campbell and Co.* for 342*l.* payable to the order of the defendants, and one *George Payne*, deceased, three months after date, and indorsed by the defendants and *Payne*, under the firm of *Wood and Payne* to the plaintiffs; and which bill *Campbell and Co.* had accepted. The plaintiffs also declared for goods sold and delivered, and on the common money counts. The defendant *Steele* pleaded *non assumpsit*, and the defendant *Wood* suffered judgment by default. At the trial, the jury found a verdict for the plaintiff for 368*l.* 5*s.* 4*d.*, subject to the opinion of the court on the following case.

“*Wood and Payne*, mentioned in the pleadings, were *wholesale grocers* in *Liverpool*, trading under the firm of *Wood and Payne*, from *January* 1802, until *January* 1804; with whom the defendant *Steele* became a partner in *May* 1802, and so continued till *January* 1804, in the business of buying and selling cotton; which business was also carried on under the same firm of *Wood and Payne*, and at their counting house; but *Steele* was never interested in the grocery business. *Steele* took no active part in the cotton concern; nor was it known to the world or to the plaintiffs that he was a partner. The plaintiffs sold to *Wood and Payne*, as grocers, a quantity of sugar, for which they gave their acceptance in the firm of *Wood and Payne* at four months, due the 11th of *October*, 1803; and not being able to provide for it when due, *Wood and Payne* on

(1) 7 *East*. 210.

the 8th of *October*, 1803, delivered to the plaintiffs the bill mentioned in the declaration due the 29th of *November*, with others, to provide for that acceptance; and the bill was indorsed by either *Wood* or *Payne* in the firm of *Wood and Payne*, without the actual knowledge of *Steele*, as all other bills in the cotton concern were. The said bill had been paid to *Wood* and *Payne*, as cotton dealers by the drawer thereof for cotton sold to him, in which *Steele* was, as aforesaid, interested; and the name "*D. Maitland*" thereto subscribed as the drawer, was the handwriting of *D. Maitland* of *Wigan*, to whom the cotton was sold. The said bill has been dishonoured, of which *Wood* and *Payne* had due notice. *Wood* and *Payne* became bankrupts on the 16th *January*, 1804, and the effects of the cotton concern were insufficient to discharge its debts; and *Steele* when he should have discharged those debts would have been a creditor of the concern. The question for the opinion of the court was, whether the plaintiffs were entitled to recover? If they were, then the verdict was to stand; otherwise, a verdict was to be entered for the defendant *Steele*." (v)

The court were clearly of opinion, that the plaintiffs were entitled to recover.

Lord *Ellenborough*, Ch. J. said: "It would be a strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners, to apply to each of the other partners to know whether he assented to such indorsement; or otherwise that it should be void. There is no doubt that in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. The case is too clear for argument, and I should not have permitted the point to be reserved, if I had not understood at the trial that there were some other facts in the case which might raise a doubt. The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time, that it is without the consent of the

(v) It does not appear from the case how *Clark*, one of the defendants, became a party.

other partner, it is fraudulent and void; but if taken *bona fide* without such knowledge at the time; no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaffirm the act. Now here the three persons were trading under the firm of *Wood and Payne*, and in the course of their dealings as partners received the bill in question; and it was competent to either of them by his indorsement, in the name of the firm, to pass their interest in the bill: and the plaintiffs ignorant of any fraud at the time, take it by such indorsement from one of the partners. Then if the interest of the plaintiffs in the bill were once well vested, no subsequent knowledge that such indorsement was made without the consent of one of the partners will divest it. And it would be highly inconvenient that it should; because if the plaintiffs had been apprized at the time, that the partner who indorsed the bill had no authority to do so, they might have obtained some other security for their demand.

But in the case of *Wells v. Masterman* and others,^(u) which was an action of *assumpsit* on two bills of exchange, drawn by the plaintiff on the defendants by the style of *James Masterman and Co.* dated the 30th of *January* 1798; accepted by *James Masterman* only, without the words *and Co.* The partnership commenced in 1795.

James Masterman carried on a separate trade on his own account, and had had dealings with the plaintiff before his partnership, who had also dealings with the firm.

The defence set up to this action was, that the bills were drawn on the separate account, and for the separate concern of *James Masterman* only; and that the acceptance in question did not bind the partnership, so that an action could be maintained against them, as the acceptors of the bills in question; and another bill of exchange was produced, drawn in the same style and manner as those in question, but accepted by *Masterman* and *Co.* which had been paid.

Lord *Kenyon*, Ch. J. said: "When a man enters into a partnership, he certainly commits his dearest rights to the discretion of every one who form a part of that partnership in which he engages; and if a bill is drawn upon the partnership in their usual style and firm, and it is accepted by one of the partners, it certainly binds the partnership to the payment of it: but if a man who has

(u) 2 *Esp. Rep.* 731.

dealings with one partner only, and he draws a bill on the partnership on account of those dealings, he is guilty of a fraud, and in his hands the acceptance made by that partner would be void; but it would be otherwise in the case of a *bonâ fide* indorsee. In his hands, the acceptance of one of the partners binds the partnership, as he is ignorant of the circumstances under which it was created, and takes it on the credit of the partnership name."

So, where two partners contract a debt prior to the admission of a third partner, for which the creditor, at the instance of the two, afterwards draws a bill upon the three in the name of the partnership firm; and the bill is accepted by the two, without the privity of the third, such creditor cannot recover upon it; though if such bill gets *bonâ fide* into the hands of an indorsee, all the partners are liable to him and may be sued thereon.

Thus, in the case of *Shirreff and others v. Wilks*, (*w*) which was an action upon the case upon a bill of exchange for 78*l.* dated the 5th of *November* 1796, payable to the order of the plaintiffs two months after date, which was stated in the declaration to have been drawn by them on the said *G. Bishop, W. Robson, and J. Wilks*, by the name and description of Messrs. *George Bishop and Company*, and to have been accepted by them. The defendant *Wilks* pleaded the general issue, on which issue was joined.

The cause was tried before Lord *Kenyon*, Ch. J. at *Guildhall*, and a verdict was found for the plaintiffs for 90*l.* 10*s.* including interest on the bill; subject to the opinion of the Court of *King's Bench* on the question, whether the plaintiffs were entitled to recover under the following circumstances.

The plaintiffs in *October* 1795 sold and delivered a quantity of porter to *Bishop and Wilks*, who were then partners, which porter was entered in the plaintiffs' books in the names of *Wilks and Bishop*; and the same was afterwards shipped for the *West Indies*, and the defendant *Wilks* paid the shipping charges. *Robson* became a partner with *Bishop and Wilks* in *April*, 1796, and continued so till the 8th of *November* following, when their partnership was dissolved. The defendant *Wilks* previous to the dissolution of the partnership sent to the plaintiffs a memorandum or calculation in his own handwriting of certain deductions claimed

(*w*) 21 *East Rep.* 48.

by him in respect of the porter. The balance due to the plaintiffs in respect of the porter was 78*l.* for which the plaintiffs drew upon the defendants the bill mentioned in the declaration, which bill was accepted by *Bishop* in the partnership firm of all the defendants by his subscribing thereon "Accepted G. B. and Co."

The court were of opinion that the plaintiffs were not entitled to recover.

Lord *Kenyon*, Ch. J. said: "I do not know how this case came to be reserved for the opinion of the court; for I have decided the same question repeatedly at the sittings, and the propriety of my decision has never been canvassed again upon a motion for a new trial. This is an action brought against three persons, *Wilks*, *Bishop*, and *Robson*, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by *Bishop* alone in the name of the firm. The consideration for this bill was some porter which had been sold by the plaintiffs to *Wilks* and *Bishop* only, at a time when *Robson* had no concern with the house. Then the plaintiffs, knowing this, drew the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, *Robson*, had no concern with the matter, and was no debtor of theirs; no assent of his being found, and nothing stated to show that he had any knowledge of the transactions. It is hard enough for one partner, in any case, to be able to bind another without his knowledge or consent, but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs therefore ought not in justice to have taken this security by which they were to bind one who was not their debtor: the transaction is fraudulent upon the face of it. It is no answer to say, that one partner has a general power of binding the rest. So an executor has power to bind the assets of the testator, and to sell and dispose of his effects and the law reposes a confidence in him, that he will apply, the proceeds in payment of the testator's debts, and legacies; but if fraud could be proved in any particular transaction between the executor and a purchaser, such a sale would be void.

Nothing can be better established, as a general rule, than, that the law will set aside every contract which is fraudulent. Such is the case here. *Wilks* and *Bishop* owed money to the plaintiffs; these latter, knowing that *Robson* had no concern with the mat-

ter, fraudulently receive from *Wills* and *Bishop* a security by which *Robson* is to be bound : this therefore cannot be enforced in this action."

Lawrence, J. said : "The plaintiffs in this action declare as upon a promise by three defendants, and consequently to entitle themselves to recover they must prove a promise either express or implied binding upon all the three : in this they have failed, and therefore there must be judgment against them. In addition to the authorities cited by my Lord to show that *Robson* was not bound by this act of his partners, is the case of *Hope v. Cuff*. [He then read the following note from a MS. of the late Mr. Justice *Buller*, taken by him, when he was at the bar.] "*Hope v. Cuff*, sittings at *Guildhall* after *Mich. Term*, 1774, Mr. *Fordyce* who traded very largely in his separate capacity, as well as in the business of a banker, in partnership with others, having considerable dealings in his private capacity with *Hope* and Co. in *Holland*, did, for and in the names of himself and partners, give them a general guarantee for the money due from him in his separate capacity. *Fordyce* became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the Court of *Chancery* by *Hope* and Co. in order to have the benefit of this guarantee : upon which that court directed an issue to try the validity of it. Lord *Mansfield*, in summing up the evidence to the jury, said, "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantee in the name of all the partners it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to, or be equivalent, to covin : for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore the whole will turn on this, whether the taking the guarantee from *Fordyce* himself in his own handwriting, without consulting the other partners, or having their privity, is not such gross negligence in the *Hopes* as will amount to a fraud or covin. *Fordyce* was acting in two several capacities, having transactions in his own name only, for his own separate benefit, and in the names of the partnership for his own benefit. This case comes out of *Chancery*, where an affidavit or answer of all parties might have been had if necessary ; but none such has been produced, and therefore it must be taken that the partners knew nothing of it, and

and had no profit by it, or privity in the transaction. Another fact to be granted is, that as between *Hope* and Co. and *Gurnal* and Co. and *Fordyce*, the whole transactions are avowedly with *Fordyce* only in his separate capacity. The next fact is the correspondence in 1770, preceding the second guarantee. It is clear that *Fordyce's* deposits and interests in the funds were both doubted, and then the *Hopes* tried to make a scheme to get a second security without shocking him, by suggesting there was a new partner. The first guarantee was given in 1764, and that never had been called in, and still existed. There was then no occasion for a new one: for the change of a partner, and taking in a new one, would not destroy a former guarantee. The scheme was to get security for debts not well secured, the goodness of which was doubted; and they therefore get this from *Fordyce* alone, clandestinely, without the knowledge of his partners. If the fact be clear that *Hope* and Co., and *Gurnal* and Co., knew that this was done to cheat the partners of *Fordyce*, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore this brings it to the second question, whether it be not a gross negligence; especially as they knew at the time that *Fordyce* was acting in his separate capacity; and this security was intended to indemnify them against his separate debts. Verdict for the defendant. Lord *Mansfield* afterwards, in his report to the Court of *Chancery*, on a motion being made for a new trial, said, three things were established to the satisfaction of himself and the jury. First, that the transactions between *Hope* and Co. and *Fordyce* were wholly on *Fordyce's* account. Secondly, that the partners of *Fordyce* derived no profit or benefit whatsoever from them. Thirdly, that they had no notice of the guarantee; and consequently did not acquiesce in it. And Lord *Mansfield*, said, he left it to the jury, whether under these circumstances the taking of these guarantees were, in respect of the partners, a fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust *Fordyce* was guilty of in giving them."

So, in the case of *Arden v. Sharpe and Gilson*, (*) which was an action of *assumpsit* by the plaintiff as indorsee of a bill of exchange drawn by *R. Cowan* on one *Rae*, at two months after date in favour of

(*) 2 *Esp. Rep.* 524.

R. Packer for 6*cl.* dated the 4th of *March* 1796: The case as proved, on the part of the plaintiff, was, that on the 1st of *March*, the day on which the bill bore date, *Gilson*, one of the defendants, brought the bill in question to the plaintiff, and requested him to discount it; the plaintiff said he could not do it himself, upon which the defendant *Gilson* answered, he could get it done for him, but wished the business to be kept a secret from his partner *Mr. Sharpe*; to which the plaintiff assented and took his bill. The witness then proved, that the indorsement "*Sharpe and Gilson*" was in the handwriting of *Gilson*. On this evidence the plaintiff rested his case.

Lord *Kenyon*, Ch. J. said: "This action, under the present proof, cannot be supported; the bill is indorsed by one partner, in the name of the firm; one partner certainly may indorse a bill in the partnership name, and if it goes into the world, and gets into the hands of a *bonâ fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use; in such case the partnership is liable; but the case is different where the party who brings the action was himself the person who took the bill with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other; he cannot sue the partnership, the transaction indicates that the money was for that partner's own use, and not raised on the partnership account, therefore shall not be allowed to resort to the security of the partnership, to whom in the original transaction he neither looked or trusted." The plaintiff was accordingly nonsuited.

So, an authority given to one partner, on the dissolution of a partnership, to receive all debts owing to, and to pay those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution.

Thus, in the case of *Abel and another v. Sutton*, (y) which was an action brought by the plaintiffs, as indorsees, against the defend-

(y) 3 *Esp. Rep.* 198. See also *Kilgour v. Finlayson and others*, 1 *H. Bl.* 155. *S. P.*

ant, as surviving partner of one *Poynter*, upon a promissory note for 68*5*l. 11*s*. dated the 27th of *May*, 1799, and payable in six months after date, drawn by Messrs. *Horton and Co.* in favour of *Sutton and Co.* and indorsed in the partnership name of *Sutton and Co.* to the plaintiffs.

The defendant and *Poynter* had carried on business in partnership, under the firm of *James Sutton and Co.* On the 31st of *May*, 1799, the partnership had been dissolved, and notice of the dissolution published in the *London Gazette* of the 1st of *June*: and the defence was, that the note in question was an accommodation one, created after the dissolution of the partnership, though it bore date before; and the partnership name put on by *Poynter* alone, without authority from the defendant; or that even if it existed prior to the dissolution, it had not been put into circulation until after. The indorsement, "*James Sutton and Co.*" was in the handwriting of *Poynter*, and it appeared clearly that it had not been made till the 28th of *August*, nearly two months after the dissolution of the partnership: but it was stated, and admitted to be the custom of trade, that when bills or notes had a long time to run, it was not usual to put them into circulation until near the time they became due, or when they had about the usual time of discountable securities to run.

For the plaintiffs it was contended, that where a partnership had been dissolved, and one of the partners had authority given him to settle and liquidate the partnership accounts, and due notice to that effect was given (as in the present case in the same advertisement in the *Gazette*) which contained notice of the dissolution of the partnership) such partner had a right to use the partnership name in negotiating bills or securities which existed previous to the dissolution, until the accounts were liquidated: and Mr. *Barneswall*, one of the special jurymen, said, it was very customary for one partner to use the partnership name long after it was notoriously dissolved, in negotiating the partnership securities, for the purpose of liquidating the partnership accounts, and winding up the concern; and observed, that many bills could not be received if the partnership name was not upon them.

For the defendant it was argued, that as the declaration stated *Sutton and Co.* indorsed the note, it was necessary to show that the partnership existed at the time the note in question was indorsed; and

and he cited *Dixon v. Evans*, 6 Term Rep. 57, in support of this position.

Lord *Kenyon*, Ch. J. said, "If a fair bill existed at the time of the partnership, but is not put into circulation until after the dissolution, all the partners must join in making it negotiable. The moment the partnership ceases, the partners become distinct persons: they are tenants in common of the partnership property undistributed of from that period; and if they send any securities which did belong to the partnership into the world, after such dissolution, all must join in doing so. I even doubt much if an indorsement was actually made on a bill or note before the dissolution, but the bill or note was not sent into the world until afterwards, that such indorsement would be valid."

In the course of the cause a witness was called who had been clerk to *Poynter*. He was asked if he did not know that *Poynter*, after the dissolution of the partnership, had put the partnership name on bills antedated to a time previous to the dissolution. This question was objected to on the ground that it assumed as a fact that bills had been antedated, without showing that such bills in fact did exist.

Lord *Kenyon*, Ch. J. was clearly of opinion, that the question was a legal one; and one of the counsel mentioned the cases of indorsements by procuration, in which it was every day's practice to ask witnesses, if bills had been indorsed by procuration, without producing any such.

It was then given in evidence that *Poynter* had received money for securities belonging to the partnership, which had been thrown into the general fund, and had been applied in liquidation of the partnership debts, after the dissolution. The counsel for the plaintiffs, in reply, stated two positions in support of the plaintiff's claim; 1st, that if bills existed before the dissolution of the partnership, and one of the partners had authority to settle and liquidate the partnership accounts, such partners had a right to put the partnership name upon such bills; and that a *bona fide* holder of such bill would have a right to resort to all the partners: 2dly, that if he put into circulation bills in the partnership names, upon which money had been raised, which was applied in liquidation of

of the partnership debts, it was money had and received to the use of all the partners, and all would be liable.

Lord *Kenyon*, however, (after observing that there was no evidence to show that the money raised upon the bill in question had been so applied) expressed his most decided dissent to both positions: he said, "it could never be allowed that any one might make another his debtor against his will: by that means, a man's greatest enemy, by paying his debts, might make himself his creditor. The most mischievous and distressing consequences might ensue from such a doctrine. He had often ruled, that it could not be done; and he was still of the same opinion. With respect to the other position, his Lordship said, when a man takes a partner, he takes him for better, for worse; he reposes confidence enough, and places himself sufficiently in the power of his partner during the partnership. To contend that this liability to be bound by the acts of his partner, extends to a time subsequent to the dissolution, was, in his mind, a most monstrous proposition. A man in that case could never know when he was to be at peace, and retired from all concerns of the partnership, if one partner was to have the power of binding another long after the dissolution of the partnership. I am of opinion, said his Lordship, if a bill is sent into circulation after the dissolution of a partnership, that, beyond all controversy, all the partners must join in the indorsement; and one, by putting the partnership name, cannot bind the rest." The jury accordingly found a verdict for the defendant.

Where two partners give a joint bill of exchange for a partnership demand, which is not paid when due, and the holder takes a *separate* bill, or security, of one of the partners, without the knowledge of the other, the latter is thereby discharged.*

Money lent to one partner, whilst he is engaged in the partnership business, in order to defray certain expences of travelling, shall be deemed a partnership debt, and recoverable against all the partners.

Thus, in the case of *Rothwell v. Humphreys and Howell*,⁽²⁾ which was an action of *assumpsit* for money lent. The defendants were partners, carrying on the business of linen-draper, in *London*; the

* *Vide* 4 *Esp. Rep.* 91. 5 *Esp. Rep.* 122.

(2) 1 *Esp. Rep.* 456.
plaintiff

plaintiff was a suttian manufacturer at *Manchester*. *Howell*, one of the defendants, had gone down to *Manchester*, to purchase goods, in the way of his trade, and had, in fact, purchased from the plaintiff, to the amount of 500*l*. Being about to return, he borrowed 10*l*. from the plaintiff, to defray his expences to *London*; and having drawn a bill on the house in *London* for the amount of the goods, he included in it the 10*l*. so borrowed, and the bill was drawn for 510*l*.

Before the arrival of the goods in *London*, *Humphreys* and *Howell*, the defendants, became insolvent; and the plaintiff stopped the goods *in transitu*; so that the bill was never presented, and the action was brought to recover the 10*l*. lent only.

The defence relied upon was, that the action was brought against both partners for a loan of money admitted by the evidence, to have been made to one of them, and which therefore could not be supported.

But Lord *Kenyon*, Ch. J. said, "that though the loan of money was to one of the partners, it was lent to him while employed in the partnership business, and on its account; that as such, it was competent to him to bind the partnership to the payment of a debt so contracted, and which, in fact, he had done, by including the money lent in the same bill with that for goods sold clearly on the partnership account." A verdict was accordingly found for the plaintiff.

So, where one of several partners receiving money, or goods, of a third person, in the usual course of business, on the partnership account, in order to be applied to a particular purpose, wrongfully misapplies such money, or goods, to his own private use, all the partners are answerable.

Thus, in the case against *Layfield* and others, (a) which was an action on the case for money had and received to the plaintiff's use, it appeared, upon evidence, that *Layfield* and the other defendants were bankers and partners, and that the plaintiff had given *Layfield* 20*s*. for which he received a ticket in the double exchange lottery, and *Layfield* undertook to pay what benefit should happen thereupon; that the ticket came up a 40*l*. benefit, and for that money the action was brought. It was objected for the defendants, that the action was brought against *Layfield* and his

(a) 1 *Salk.* 292. *Holt's Rep.* 434. S. C.

partners; whereas it did not appear that any of them had undertaken to be trustees in the lottery, except *Layfield*, and therefore he only ought to be charged, and not his partners.

But *Holt*, Ch. J. answered, that it appeared they were partners in their trade, and goldsmiths, and the adventurers put their money in upon the credit of several goldsmiths, that had undertaken to pay the benefits; and it should be presumed the act of *Layfield* was the act of the other, and should bind them, unless they could show a disclaimer, and a refusal to be concerned in it. Accordingly the plaintiff had a verdict for forty pounds.

So, if two persons are in partnership as *attornies* and *conveyancers*, and one of them receives money to be laid out on *mortgage*, but misapplies it, the other is liable for the amount.

Thus, in the case of *Willet v. Chambers*, (a) which was an action of *assumpsit* for money had and received to the plaintiff's use, brought against the defendant, as *surviving partner* of one *Dadley*. At the trial a verdict was found for the plaintiff, damages 48*cl.*: and upon a rule to show cause why a new trial should not be granted, the facts appeared to be as follow: that, prior to any partnership between the defendant and *Dadley*, who was an attorney and conveyancer, at *Coventry*, the latter, in the year 1771, received of a Mr. *Bindley* the sum of 350*l.*, to be laid out on a real security. *Dadley* accordingly furnished him with a mortgage from a Mr. *Hughes* to that amount; which, as it afterwards appeared, *Dadley* had forged. At *Midsummer* 1776 *Dadley* and *Chambers* entered into partnership; shortly after which, *Bindley* wanted to call in his money. The pretended mortgagor was supposed at the same time to want a further sum of 150*l.*, which, added to the original mortgage money, made together the sum of 500*l.* The plaintiff, *Willet*, was ready to advance this sum; and, in consideration of his doing so, an assignment was made to him of the pretended mortgage before made to *Bindley*, as to 180*l.* part of this sum of 500*l.* *Willet* paid it into *Dadley's* office to *Chambers*, who gave the following receipt for it: "Received of Mr. *Benjamin Willet*, the sum of 180*l.*, for which I promise to account to him on demand. *Chambers.*"

Dadley was not at home when this sum was paid. Some time after, the plaintiff called at the office to pay 300*l.* more, part of

(a) *Cowp.* 814.

the remaining 32*ol.* due. *Dadley* being then at home, *Willet* paid the money to him; and, in return, *Dadley* gave him the following receipt: "Received on account of Mr. *Benjamin Willet*, 30*ol.* the "remainder of the money to be paid, being 2*ol.* *Dadley*."

It was admitted that the defendant, *Chambers*, was in no respect privy to the forgery; and that no procuration money was paid either to *Chambers* or *Dadley*.

The Court refused the rule, and determined this to be a partnership transaction, and that the defendant was answerable for the act of his partner. Lord *Mansfield*, Ch. J. said, "Both parties in this case undoubtedly are innocent; and the loss that will fall upon the defendant, if the law is against him, will be much greater than that which will be sustained by the plaintiff, if he fails. It is indeed so hard a case upon the defendant, that every leaning of the Court would be in his favour. But the question is, "Whether, in point of law, this engagement with *Dadley* does not make *Chambers* answerable?"

To go by steps; it is necessary to see what the business was which *Dadley* carried on alone, before his connection with the defendant, in the year 1776. By admission of the counsel on both sides, it was the business of an attorney and conveyancer. By proof in the cause, it appears to have been a great deal more: for he had many appointments, though the nature of them is not particularly mentioned. He had also agencies, and was clerk to a navigation. But there is no pretence that he ever received procuration money. The business of conveyancing, in the very nature of it, as carried on in the country, is this: where there is an attorney, or counsel of credit, they receive money to place out upon securities; and persons who want to borrow, as well as those who want to lend, apply to them for that purpose. Their profit arises from having the money in their hands before it is laid out upon the intended securities; and from their fees and bills of charges upon the conveyances they draw. It is not disputed but that this was the nature of *Dadley*'s conveyancing business: he did not act however as a scrivener, who sometimes does not touch the money, but who in all cases gets procuration money. There is no proof of any transaction of that kind; nor indeed is it customary for attorneys like him to do so; for they get profit enough without it. I remember a case before me of a person who was trusted to

the amount of many thousand pounds, in the manner I have stated; and that is the nature of the business.

This was the business of *Dadley* before the partnership. Let us see then what was the nature of the partnership afterwards entered into, between *Dadley* and the present defendant; whether it was a general partnership in *Dadley's* business, or confined to one particular branch of it only; for to be sure there may be such a confined partnership. The evidence as to this point consists in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears there was no particular restriction; it was not to be confined to suits, nor to conveyancing only; but they were to be partners in the business which Mr. *Dadley* carried on. Each was to be worth a certain sum: the profits are stated at 800*l*. Then it is agreed that a provision shall be made for the family of whichever of them should happen to die first. And then comes the following clause, at the end, which, though not taken notice of by the counsel on either side, is very material indeed upon this occasion. My object in examining it particularly was, to see whether it contained any restriction. The clause is this: "Note, this scheme of partnership is intended to include all Mr. *Dadley's* present and future practice and appointments, such as agencies, navigation-clerk, &c. but not to extend to any public office or place, which may at any future time be given to either of the parties." The only restriction, therefore, is that; or, more properly speaking, it is the only exception to this general partnership.

Thus, the partnership commences, without waiting for articles; and from that time the business was carried on in partnership. One branch in that business was conveyancing. Incident to conveyancing is the receiving of money to place out upon securities. Receiving it from the lender to advance to the borrower, and acting for both parties respectively. From that the profit arises; not from procuration money, but from the money lying in their hands before it is placed out; and when placed out, from the charges and fees for drawing and engrossing the conveyances.

The facts then are shortly these:—the plaintiff *Willet*, wanting to place out a sum of 500*l*., applies to the office, without making any distinction between the two partners. The first sum he advances is 180*l*.; this he pays to *Chambers*, who gives a receipt for it, not expressing it to be for *Dadley*, or for what, or whose use; but

but making himself accountable for the amount, on demand. He receives it therefore as the principal, not as the agent of *Dadley*; and it is admitted he knew the use, by placing it out upon the security for which it was put into his hands. The next sum, which was 300*l.*, is paid by the plaintiff to *Dadley*, who receives it exactly in the same manner as *Chambers* did the former sum—as principal; and gives a receipt for it, not as for so much money to be placed out, but as a sum for which he was to be accountable. The two sums together come within 20*l.* of what was wanted upon the security. Afterwards the bill for conveyancing is brought in. *Hughes* being the original mortgagor, if he had not been a fictitious person, and had wanted a further sum of money upon the assignment, he should have paid the expence of conveyancing. But the bill is brought in to the plaintiff, and made out, “debtor to *Chambers* and *Dadley*.” *Chambers* receives the money, and gives a receipt for it. In that transaction, therefore, he is clearly considered as a partner, and the transaction itself as a partnership transaction. If *Dadley* had received procuration money, and that kind of dealing had been excepted out of the articles, or, if separate accounts had been kept of the money got by these transactions, and it had all been set down to the profits of *Dadley* only, it might have varied the case: and Mr. Justice *Albhurst*, who tried the cause, would have been very glad to have given a direction in favour of the defendant. He suffers by the rascality of a man who had a very good character. I am very sorry for the defendant; but upon this evidence I cannot say but that it is a partnership transaction.”

So, where one of two partners, being a trustee, applied trust-money to the use of their joint-trade with the privity of the other partner; and they afterwards separated, and by agreement the partnership effects were assigned over to the first partner, who took upon himself the payment of the joint debts; this was held to be no payment in discharge of the other partner, but that both were liable to make good the trust-money. (*b*)

So, an action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner, for the purposes of smuggling, though the other partners, who resided in *England*, knew nothing of the sale;

(*b*) *Smith and others v. Jamelson and another*, 5 Term Rep. 601.

for it is a contract by subjects of this country, made in contravention of the laws : and the Court said that the case must be considered in the same light as if all the parties lived in *England*. (c)

One partner cannot bind his copartner by deed or writing under seal, without an express authority from him, by writing under seal. (d)

It has, however, been determined, (e) that a bill of sale executed by one partner, with the consent and in the presence of the other, is binding upon both the partners.

3. Of Contracts with a Partnership Firm, after a Change or Dissolution of Partnership ; and of the Notice necessary to be given of such Change or Dissolution.

Where a partnership consists of a certain number of persons, if any of the partners withdraw from the firm, and no notice is given thereof, any person, dealing with the partnership either before or after such change, has a right to call upon all the parties who at first composed the firm. (f)

But where three persons entered into partnership in the trade of sugar-boiling, and it was agreed that no sugars should be bought without the consent of the majority. One of them afterwards withdraws himself from the partnership, of which he gives public notice ; and subsequent to this, the two other partners make a contract with A. for a large quantity of sugar, who had full notice that the third partner had withdrawn. It was determined that such third partner was not answerable for any part of the sugar so purchased. (g)

When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners ; a mere notice in the Gazette, in such case, not being sufficient.

(c) *Biggs v. Lawrence*, 3 *Term Rep.* 454.

(d) *Harrison v. Jackson*, 7 *Term Rep.* 207.

(e) *Ball v. Duniterville*, 4 *Term Rep.* 313.

(f) *Per Le Blanc Juss.* 3 *Esp. Rep.* 248.

(g) *Minnit and Whinery*, 5 *Bro. P. C.* 489. *ed.* and 16 *Vin. Abr.* 214. *pl.* 12. *S. G.*

Thus,

Thus, in the case of *Graham* and others, v. *Hope* and others, (b) where it appeared that the defendants had been in partnership together, and the plaintiff had sold them goods as partners. Afterwards the partnership was dissolved, and notice of the dissolution given in the *London Gazette*; and after this notice, the plaintiff had sold and delivered the goods, for which the present action was brought.

The defendants called witnesses, who swore that a notice had been given to the agent of the plaintiff, that the partnership was dissolved. The agent on the contrary positively swore that he had received no such notice.

Lord *Kenyon*, Ch. J. before whom the cause was tried, told the jury, that "the cause depended entirely on the credit they gave to the witnesses on the one side and the other. The *Gazette*, he thought, was not of itself sufficient notice to the plaintiff of the dissolution of the partnership. His lordship said, he did not say this for the purpose of this cause merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never saw a *Gazette* to the day of their deaths, and very mischievous would be the consequences, if they were bound by a notice inserted in it. It was incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons with whom they had had dealings in partnership." The jury believing the defendant's witnesses, gave a verdict for the defendant.

But a notice in the *Gazette* of the dissolution of a partnership is a sufficient notice to all persons who have had no previous dealings with the firm.

Thus, in the case of *Godfrey v. Turnbull* and another, (i) which was an action brought by the plaintiff, as indorsee of a promissory note against the defendants as the makers of it. The defendants had been partners in trade, but the partnership had been dissolved prior to the date of the note.

Macauley, one of the defendants, suffered judgment to go by default.

(b) *Peake's Cas. N. P.* 154. See also *Gorham v. Thompson*, 13. 42. S. P.

(i) 1 *Esp. Rep.* 371.

The other defendant relied upon this circumstance, namely, that the note was made by the defendant *Macauley* only, after the dissolution of the partnership, who had put their joint names on it without any authority from him.

The note was dated the 6th of *April*, 1793. On the 19th of the *March* preceding, notice of the dissolution of the partnership, dated the 15th, had appeared in the *Gazette*.

The question was, whether the notice given in the *Gazette* was sufficient, so as to exonerate the defendant *Turnbull*.

Lord *Kenyon*, Ch. J. said: "In general, if a partner gives a note in the partnership name, all the partners are bound by it; and that is the case, even if given after the actual dissolution of the partnership, if that was not sufficiently notified, and the party who took the note, took it on the faith of the partnership name."

A secret dissolution of a partnership cannot discharge the partners; but if the dissolution is notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least, to those who have had no previous dealing with the partners, it seems sufficient, at least, to be left to the jury from thence to infer notice.

In many cases, notice in the *Gazette* is sufficient to subject a party to penalties, as in the cases of smuggling and outlawries. So, in the case of bankrupts, notice in the *Gazette* is sufficient for every purpose. In the present instance, there is no proof of any actual notice to Mr. *Godfrey*, the plaintiff, but the publication in the *Gazette* is proved, antecedent to his taking the note.

The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every *Gazette* of the dissolution of partnerships; which seems to point out that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them."

The jury, under this direction, found a verdict for the defendant, *Turnbull*.

4. How Partners must sue and be sued.

Upon a partnership contract or debt, all the partners, or their Assignees, must sue and be sued; the contract or promise being joint. And if

one partner only sues upon a joint contract, the action cannot be maintained; and the defendant may take advantage of this omission at the trial, and nonsuit the plaintiff. But in an action for a *tort* or *wrong* this matter can only be taken advantage of by *plea in abatement*. (k)

The action upon the contract must, however, be brought at the suit of such partners only as were in partnership at the time of making the contract. (l)

But in the case of *Garret v. Taylor*, (m) where three had employed the defendant to sell some timber for them, in which they were jointly concerned; two of them he had paid their exact proportion, and they had given him a receipt in full of all demands; *the third now brought his action for the remainder, being his share*; and it was objected, that as this was a joint employment by three, one alone could not bring his action: But it was ruled by Lord Mansfield, that *where there had been a severance*, as above stated, that one alone might sue.

In actions *against partners* all of them should regularly be sued; though if one be sued alone, he can only take advantage of this omission by *plea in abatement*; for if he were allowed to give it in evidence, upon the trial, and so nonsuit the plaintiff, it would be a great hindrance to justice: for in many cases a creditor does not know all the partners; particularly a secret one. But when the defendant pleads in abatement, he must set forth in his plea the names of all his partners, and the plaintiff is thereby informed against whom he ought to proceed. (n)

With regard to surviving partners it is a rule, that where one of several partners dies, an action upon a partnership contract must be brought in the name of the survivors only: for the executor and the survivors cannot join, because the remedy survives.* And in an action by or against a surviving partner, the plaintiff may declare not only for a debt contracted in the life-time of the deceased partner, but also for a debt due to or from the survivor in his own right. (o)

(k) *Vide* 2 *Str.* 820. 2 *Term Rep.* 282. 3 *Term Rep.* 433. 779.

(l) 1 *Esp. Rep.* 182. (m) *Sitt. at Guildhall, Trin.* 4 *Gco.* III, *ex eam* Lord Mansfield, 1 *Esp. N. P.* 117.

(n) 2 *Bl. Rep.* 695. 947. 5 *But.* 2613. See also 1 *Saund.* 291. b. n. 4.

* 2 *Salk.* 444.

(o) *Vide* 2 *Term Rep.* 476. 3 *Term Rep.* 433. 5 *Term Rep.* 423. 6 *Term Rep.* 582.

5. Of the Remedy by Partners upon Contracts, &c. *Inter se.*

Generally speaking, one partner has no remedy at law against his co-partner for any thing relating to the partnership concern, except upon an express contract or promise made between them; the only remedy being in a court of equity.

But money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied is proveable as a debt under the commission of the bankrupt partner, and also recoverable against the solvent partner; and if the latter be not called upon to repay the debt to the joint creditor till after the bankruptcy of the other; he may recover from the bankrupt partner his share of such debt so paid after the bankruptcy to the joint creditor, notwithstanding he may have obtained his certificate. (p)

So, where A. engages as a partner in a particular transaction with B., C., and D., who were before partners; B., C., and D., become bankrupts, after which A. pays a debt due from himself and them to a joint creditor; it was determined that these three partners constituted but one debtor to A., and that he might recover from B. the proportion of B., C., and D., towards the joint debt; B., not having pleaded in abatement. (q)

So, where A., B., and C., having dissolved partnership, C. after such dissolution, drew bills in the partnership firm in favour of D., he not knowing of such dissolution, upon which D. brought his action against all the former partners, and C. having pleaded his bankruptcy, D. entered a *nolle-prosequi* as to him, and recovered judgment against A. and B., which was afterwards satisfied by the attorney of A. and B., who advanced part, and borrowed the rest of the money on their joint credit: it was holden, that the sum so paid, in satisfaction of the judgment, might be recovered in a joint action by A. and B. against C. (r)

But where A. and B. are engaged in a partnership in insuring ships, &c., which is carried on in the name of A., and A. pays the

(p) Wright v. Hunter, 1 East Rep. 20. (q) Ibid.

(r) Osborne and another v. Harper, 5 East Rep. 225.

whole of the losses. Such a partnership being illegal by Stat. 6 Geo. I. c. 18., A. cannot maintain an action against B. to recover a share of the money that has been so paid. (s)

Though, if two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them, with the privity and consent of the other, repay the broker the whole sum, he may recover a moiety from his companion in an action for money paid to his use, notwithstanding the Stat. 7 Geo. II. c. 8. (t)

One partner may maintain an action against his copartner, for money received to the separate use of the former, and wrongfully carried to the partnership account. (v)

But where A., B., and C., became partners in insuring ships, (contrary to the Stat. 6 Geo. I. c. 18. f. 12. s) and it was agreed that the policies should be underwritten in the name of A. only, several policies were effected, and the premiums received by C. and D. as brokers: it was determined that A. could not recover these premiums from C. and D. (u)

Where two persons enter into articles of partnership for a term of years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the term expires, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise. (w)

(s) *Mitchell and others v. Cockburne*, 2 H. Bl. 379. See also *Aubert v. Maze*, 2 Bos. and Pul. 371. S. P. (t) *Petrie and another v. Hannay*, Bart. 3 Term Rep. 418. See also *Yaikney v. Reynous*, 4 Bur. 2069.

(v) *Smith v. Barrow*, 2 Term Rep. 476.

(u) *Booth and others v. Hodgson and another*, 6 Term Rep. 405.

(w) *Foster v. Allanfon*, 2 Term Rep. 479. *Moravia v. Levy*, Ib. 483. n. s.

CHAPTER VII.

Of Owners, Masters, and Seamen of Merchant-Ships.

THE subject of this chapter may be arranged under the following heads:

1. *Of the Owner's and Master's Liability upon Contracts for Repairs and Necessaries, &c.*
2. *Of the Owner's Liability for Money borrowed by the Master for the Use of the Ship.*
3. *Of Freight.*
4. *Of Demurrage.*
5. *Of Passage Money.*
6. *Of Seamen's Wages: And,*
 1. *Of the Contract of hiring.*
 2. *Of the Seaman's Right to the Whole or Part of his Wages; and of the Loss or Forfeiture thereof.*
 3. *Of the Time and Place of Payment of Wages.*
 4. *Of the Remedy for the Recovery of Wages.*

1. *Of the Owner's and Master's liability for
Repairs and Necessaries, &c.*

Upon a general contract for repairs done to a ship, it is said, (a) as a general rule, that the shipwright has his election to sue either the master, who employs him, or the owners; but if the shipwright undertakes to do the repairs on a special promise from either, the other is discharged.

So, where one of two joint owners conveys his moiety of a ship to his companion by a bill of sale, which is void by the Stat. 26 Geo. III. c. 60. s. 17. in consequence of some informality in the certificate of registry not being truly recited in the bill of sale, both the owners remain liable for repairs done to the ship, notwithstanding the execution of the bill of sale. (b)

So, where a ship was burnt by accident in the shipwright's dock after the repairs were nearly finished, the owner was held liable for so much of the repairs as were actually done at the time the accident happened.

Thus, in the case of *Menetone v. Athawes*, (c) which was an action of *assumpsit* by a shipwright for work and labour done, and materials provided, in repairing the defendant's ship: and the question was, "whether the plaintiff was entitled to recover under the following circumstances."

The ship, being damaged, was obliged to put back in order to be repaired; and she was to have gone out of the dock on a *Sunday*: but in the interim, *viz.*, on the day before, and when only three hours work was wanting to complete the repair, a fire happened at an adjacent brewhouse, and was communicated to the dock, and the ship was burnt. It was the shipwright's own dock; and the owner of the ship had agreed to pay him 5*l.* for the use of it.

(a) *Garnham v. Bennett*, *Str.* 816.

(b) *Westerdell v. Dale*, 7 *Term Rep.* 306.

(c) 3 *Bur.* 1592.

The court, after argument, determined, that the plaintiff was entitled to recover for the repairs actually done to the ship.

Of Necessaries.] When a ship is supplied with *necessaries* by order of the master, the creditor has, in general, a double security. 1. The master is personally liable, as making the contract. 2. The owners are liable, whether they know of the supply or not, the master being considered as acting under their direction and appointment. The owners, indeed, are liable though they happen to let the ship for hire to the master, if the creditor is wholly unacquainted with this circumstance.

Thus, in the case of *Rich v. Coe* and others, (d) which was an action of *assumpsit* for goods sold and delivered. *Thomas Rich*, the elder, and *Thomas Rich*, the younger, being rope-makers, did, on the 21st of November, 1772, supply the ship *Henry* and *Thomas* with cables, to the amount of 5*l.* 8*s.* 3*d.* by the order of *Thomas Harwood*, the captain; and made *Harwood*, and the owners of the ship (the defendants) debtors, in the usual manner, without naming the owners, or knowing particularly who they were. The ship *Henry* and *Thomas*, was let by the defendants to *Harwood* upon certain articles, in which it was mutually covenanted between them as follows: 1st, The owners covenanted with *Harwood*, that, on his performance of the covenants stipulated on his part, he should have the sole management of the ship, and employ her for his own sole benefit and advantage, for the space of eleven years, if he should so long live, and the ship should not be lost. The covenants, on the part of *Harwood*, were, to pay a yearly rent of 36*l.* *per annum*, at stated periods; that he should at all times, at his own cost and charge, repair, maintain, and keep the vessel, and tackel, rigging, &c. in good and sufficient repair; that he would not do or omit any thing, which might subject her to be taken, seized, or forfeited; with a proviso, that in case the said rent should be in arrear for the space of twenty-one days after any of the days appointed for payment; or in case *Harwood* should die, or should not, in all things, fulfil and keep all and singular the said covenants, &c. then, it should be lawful for the owners to take possession of the said ship. The case then stated, that neither the

(d) *Comp.* 636. See also 2 *Fern.* 643. *S. P.*

plaintiffs

plaintiff's testator, nor his partner, had any notice of this contract at the time they furnished *Harwood*, the captain, with the goods. The question was whether the defendants were liable to this debt.

Lord *Mansfield*, in delivering the opinion of the court, said :
 " We have considered the case very particularly ; and after the fullest deliberation we think it impossible to say, that the plaintiff is not entitled to recover. Whoever supplies a ship with necessaries, has a triple security. 1. The person of the master. 2. The specific ship. (e) 3. The personal security of the owners, whether they know of the supply or not. 1. The master is personally liable as making the contract. 2. The owners are liable in consequence of the master's act, because they choose him : They run the risk, and they say, whom they will trust with the appointment and office of master. Suppose, the owners in this case, had delivered the value of the goods in question in specie to the master, with directions for him to pay it over to the creditors, and the master had embezzled the money ; it would have been no concern of the creditors : for they trust specifically to the ship, and generally to the owners. In this case, the defendants are the owners ; and there happens to be a private agreement between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But, how does that affect the creditors, who, it is expressly stated, were total strangers to the transactions ? And that is an answer to the observation that the plaintiff must have known the real situation of the master in this case, from the general usage and custom of the country in that respect. To be sure, if it appeared that a tradesman had notice of such a contract, and, in consequence of it, gave credit to the captain individually as the responsible person, particular circumstances of that sort might afford a ground to say, he meant to absolve the owners, and to look singly to the personal security of the master. But here it is stated, that the plaintiff had no notice whatever of the contract. The owners themselves are aware of their being liable at the time. They choose a master to whom they agree to let the ship ; and trust for their security to the covenants which they oblige him to enter into. These covenants

(e) *Sed. Vide Abbott on Shipping* 124. and the authorities there cited, *contra*.

are, that he shall keep the ship in repair, and deliver her up at the end of the term in as good condition as when delivered to him. This is not all; for they indemnify themselves against the private debts of the master, and against his being taken in execution: for, if he does not perform all and every the covenants in the agreement (except in case of the loss of the ship), the consequence, besides their remedy against him upon the covenant is, that the contract and agreement is to be absolutely at an end, and they are to take possession of the ship.

Suppose the ship had been impounded in the Admiralty Court, and that had happened at the end of the term; or, suppose the captain had then broken a covenant, which had put an end to the agreement, the defendants could never have taken the ship out of the court, without paying the debt for which the ship was impounded. We are all of opinion, therefore, that under these circumstances there is no colour to say, that the creditors should be stripped of the general security they are by law entitled to against the owners.

But in order to constitute a demand against the owners, it is necessary that the supplies furnished by the master's order should be reasonably fit and proper for the occasion, or that money advanced to him for the purchase of them, should, at the time, appear to be wanting for that purpose. The contrary in either case would furnish a strong presumption of fraud and collusion on the part of the creditor. (f)

So, wherever it appears that the credit was given solely to the owner, the master is not liable.

Thus, in the case of *Hoskins v. Slayton*, (g) it appeared, that the goods were sails made for the use of a ship; and the evidence was, that the defendant, who is the master of the ship, ordered the sails, and that the plaintiff knew the owner of the ship, and before that had applied to him that he might make them.

It was objected, on behalf of the defendant, that he was not liable, and a distinction offered, that where the owners live upon the spot, they only are liable to pay for the goods delivered for the

(f) *Vide 1 Term Rep. 77. Abbott on Shipping, 116. 122.*

(g) *Cas. Temp. Hardw. 376.*

use of the ship, though ordered by the master; but that where the owners live abroad, there the master is liable as well as they.

But *Lee*, Ch. J. said: "In general, if the master orders the goods, both are liable, the master who gives the orders, and upon whose credit the work is done, and the owners in respect of the work being done to their property; for if I, without having given orders, suffer a work to be done for me, I must pay for it: but though both are liable in such a case, yet if it appears that the credit was given to the owners only, and that the master in giving orders acted merely as their servant, he will not be liable; and he directed the jury, that if, upon the evidence, they thought no credit was given to the master, but the owners alone, then they should find for the defendant." The jury accordingly found a verdict for the defendant.

So, where an owner ordered goods for the use of his ship before the appointment of a master, it has been decided, that the master is not liable, though part of the goods were delivered after his appointment; no personal credit having been given to him. (*b*)

The mortgagee of a ship is not liable for necessaries furnished previous to his taking possession of the ship.

Thus, in the case of *Jackson v. Vernon*, (*i*) which was an action for goods sold and delivered, in which a verdict was found for the plaintiff, subject to the opinion of the court, on the following case.

The plaintiff, who was a rope-maker, on the 7th of February, 1787, and the 22d of July, and 1st of August, 1788, supplied the ship *Three Sisters* with cordage and stores, by order of one *Palmer*, the owner of her, without the knowledge of the defendant. On the 6th of February, 1787, *Palmer* gave a bond to the defendant of 300*l.*; conditioned for the payment of 150*l.*, and a warrant of attorney to confess a judgement thereon, which was accordingly entered as of *Hilary Term*, 1787, on the same day, *Palmer*

(*b*) *Farmer and another v. Davies*, 1 *Term Rep.* 108.

(*i*) 1 *H. Bl.* 114. See also *Chinnery v. Blackburne*, *Ibid.* 117. *n. a. et post*, in which it was decided that a mortgagee out of possession is not entitled to the freight, on the ground of his not being liable to the charges, *Sed Vide* 7 *Term Rep.* 312. and *Abbott on Shipping*, 16 to 21.

executed

executed an absolute bill of sale of the ship to the defendant, in consideration of 1500*l.* paid by the defendant; and also a deed of assignment of various articles of personal property, and among them a policy of insurance on the ship, *towards payment and satisfaction of the sum of 1500*l.* that day lent and advanced to him by the defendant*, which deed of assignment further recited, "That whereas to the intent and purpose of *better securing* to the defendant, the said principal sum of 1500*l.* and the interest thereof, *Palmer* had by deed-poll, bearing date therewith, bargained, sold, assigned, conveyed, and assured to the defendant, the said ship or vessel, &c. to hold to him, his executors, administrators, and assigns *absolutely*, and the said *Palmer* had likewise entered into a bond of equal date therewith in the sum of 3000*l.* conditioned for the payment of 1500*l.* and interest, and had also at the same time executed a warrant of attorney for better securing the same, and then that indenture further witnessed, and it was covenanted, &c. that the said several deeds and instruments were so executed by the said *Palmer*, for the purpose of enabling the defendant, his heirs, executors or administrators, *either by public sale, or private contract, to sell and dispose of the several matters and things, therein respectively comprised*, or other the effects of the said *Palmer*, and thereby to raise, and pay the said sum of 1500*l.* so lent and advanced, &c., and the interest thereof, without any further or other concurrence, of the said *Palmer*, his heirs, executors, administrators, or assigns, or any of them, at any time before the same should be paid off or discharged by the said *Palmer*, his heirs, executors, or administrators." But in this deed there was a covenant, from the defendant to *Palmer*, "That in case *Palmer* should pay off and discharge the said principal sum of 1500*l.* and interest, &c., before the said several matters and things should be sold or disposed of, for the purposes aforesaid, that then, and in such case, the defendant should and would reconvey, and re-assign, the said several matters and things, thereinbefore mentioned, in such manner as the said *Palmer* should reasonable require. And it was thereby also declared and agreed, that nothing therein contained should prevent the defendant from selling, and absolutely disposing of all and every of the said premises, matters, and things, thereinbefore mentioned, at any time previous to the full payment of the said sum of 1500*l.* with interest, &c." On the 30th of July, 1788, *Palmer* assigned the freight to the defendant. On the 7th of August in the same year, the defendant took possession of the ship, and received the freight due to the owner. On the 22d of the same

same month of *August*, the defendant sold the ship, and gave an indemnity to the purchaser, against all demands on her, prior to that date.

The question for the opinion of the court was, Whether the defendant was liable to pay for the cordage and stores furnished by the plaintiff, subsequent to the bill of sale, and deed of assignment and defeasance of the 6th of *February*, 1787?

Mr. Justice *Heath* and Mr. Justice *Wilson*, who were the only judges present in the court, determined that the plaintiff was not entitled to recover against the defendant; he being out of possession at the time the goods were furnished the ship.

Heath, J. said: "As we both agree in opinion on this question, and have no doubt, it would be wrong to put the parties to the expence of a second argument. This is an action for goods sold and delivered for the use of the ship *Three Sisters*, and the question is, Whether the defendant be such an owner as is liable for the payment? *Palmer* on the 6th of *February*, 1787, executed a bill of sale to him, and on the same day another deed, reciting the bill of sale with a defeasance. It has been argued, that this is not a mortgage; but though it is not in the modern form, yet it is like an ancient mortgage by deed absolute, with another deed of defeasance; no day of payment and re-conveyance is mentioned, because *Vernon* the defendant insisted on having a right to sell the ship when he pleased, on account of the insolvency of *Palmer*. From the nature therefore of the transaction, and the circumstances attending these deeds, the assignment of the ship to the defendant was in reality a mortgage.

Then the question is, Whether a mortgagee out of possession is answerable for goods furnished for the use of the ship? Now though the owners are bound by the contracts of the captain, he being their agent, yet the mortgagee is not such an owner till he has possession. The case of *Rich v. Coe* (k) is only applicable to the present, inasmuch as there *Harwood*, who had hired the ship, was not liable for necessaries, but was considered merely as the agent for the real owners. The cases of *Eaton v. Jaques*, Doug.

(k) *Ante* 332.

455. *Walker v. Reeves*, Ibid. 461. and *Chinnery v. Blackburne*, (l) are in point to show, that the mortgagee out of possession is not answerable for the contracts of the mortgagor.

Wilson, J. "The only question is, Whether, the conveyance to *Vernon* were absolute, or only by way of security? No one, I think, who reads these deeds can have any doubt of its being a mere mortgage for a loan of money. Here is a bond for 3000*l.* conditioned for the payment of 1500*l.* lent by *Vernon* to *Palmer*; a warrant of attorney and judgment entered on it; then a conveyance of the ship by a bill of sale, in consideration of the same sum of 1500*l.*; and as a farther security, a deed of assignment, with a defeasance annexed. In this deed of assignment there is no covenant for a reconveyance; because, as an additional security, *Vernon*, the defendant, stipulated for a power to sell the ship at any time, without further leave from *Palmer*. It was understood by *Palmer* to be merely a pledge for the money due, as he contracted for freight, after the conveyance to *Vernon*; for if that conveyance had been absolute, he could not properly make a contract for freight. On the 7th of *August*, *Vernon* takes possession, till which time *Palmer* was the possessor, subject to *Vernon's* claim, who was not liable till he had actual possession. The owners of a ship are liable for furniture and necessaries, because they receive the immediate benefit of the freight; and it is for that reason the contracts of the captain are binding upon them, he being their agent or servant. But the cases which have established this to be law, do not affect a mortgagee not in possession, who cannot be considered as an owner, nor as such entitled to the freight. The case of *Chinnery v. Blackburne* was decided on the ground, that as a mortgagee out of possession was not liable to the charges of the ship, so he was not entitled to the freight."

If one of several part-owners contracts for necessaries for the use of the ship, all of them are jointly liable to be sued for the price thereof. (m) If, however, the person who gives credit on such an occasion, does not at the time know that there were other part-owners, he may sue him alone from whom he received the orders. (n)

(l) *Post* 361. (m) *Wright v. Hunter*, 1 *East Rep.* 20.

(n) *Doo v. Chippenden*, Cor. Lord Kenyon, *Sitt. aft. Hil. T.* 1790. upon a plea in Abatement. *Abbott*. 84.

2. Of the Owner's Liability for Money borrowed by the Master for the Use of the Ship.

The owner is liable for money borrowed by the captain *abroad* for the *necessary use of the ship*.

Thus, in the case of *Evans v. Williams*, (o) which was tried before Lord *Kenyon*, at *Guildhall*, where the master of a ship had borrowed money abroad for the use of the ship. His Lordship held that the lender might recover against the owners the money laid out upon the ship; and this opinion was afterwards confirmed by the Court of *King's Bench*. It was proved at the trial that the master could not obtain money on the security of the ship alone, which, in the event that happened, would have been more beneficial to the owners, because the ship perished on the voyage home.

So, in the case of *Cary v. White*, (p) in which a claim was made upon the owner for money advanced to the master *abroad*, in the course of a foreign voyage, and which underwent a great deal of discussion, and seems worthy of particular notice. Sir *Humphrey Jervis*, who lived at *Dublin*, being sole owner of a ship lying at *Bristol*, under the command of *S. Symons*, and originally intended to be freighted from thence to *Ireland*, being disappointed in that voyage, and informed by *Symons* that a freight could be got for the *West Indies*, if he approved of it, wrote to *Symons* to accept such freight, and to take up as much money upon bottomry as would fit out the ship, and provide a stock for port-charges. *Symons* thereupon entered into a charter-party with *Cary*, a merchant, at *Bristol*, for the hire of the ship for a voyage to the *West Indies*, and back to *Bristol*; and by the terms of the charter-party the owner was to pay the seamen's wages, and provide all necessaries for the ship; but *Symons*, not being in cash for this purpose, borrowed 200*l.* upon bottomry of *Cary*, and also obtained a letter of credit from him to his correspondents in *Jamaica*, for whatever money he might further want, either to repair the ship, or furnish her with provisions, or to pay the seamen's wages. The ship proceeded to *Jamaica*,

(o) *Sitt. ast. Trin. T.* 28 *Geo. III. Abbott.* 117.

(p) 5 *Bro. P. C.* 325. *ed. Abbott.* 118.

and there *Symons*, the master, by virtue of *Cary's* letter of credit, took up several sums, amounting to 789*l.* On the return from *Jamaica* to *Bristol* the ship was lost. *Sir Humphrey Jarvis* refused to pay *Cary* the 789*l.* and *Cary* thereupon sued him for the recovery of it in the Court of *Chancery*, in *Ireland*, alleging that the money was expended in repairs and other necessary purposes; and he dying during the suit, the proceedings were revived, and carried on against his administrators. The *Lord Chancellor of Ireland*, assisted by one of the Chief Justices, and another Judge, at first decreed that *Cary* should recover so much of the money claimed, as, upon a trial at law, should be found to have been thus expended; but the cause was afterwards reheard, and the Court declared that *Cary* was not entitled to any relief. Upon this *Cary* appealed to the *British House of Lords*, before whom the cause was heard. On behalf of *Cary* it was argued, "That, at common-law, whatever is done by a servant, which is for the benefit of his master, and within the trust and duty of his place, binds the master as if done by himself; and in a voyage, the master of a ship is the owner's servant, whose duty requires him to provide necessaries for the ship, it being the owner's interest that they should be provided; so that whatever the master necessarily takes up and employs for that purpose, the owner is bound to pay: and that by the custom of merchants, if the master be supplied with necessaries for the ship by the order or credit of any freighter, the owner is liable to pay such freighter, and on that ground it is customary for freighters to furnish masters of the ships they take to freight with letters of credit for whatever money they may happen to want for the necessary service of the ship."

On the other side it was contended, "That it would be of a most dangerous consequence for the master of a ship to charge the person or estate of his owner with what money he should take up, on pretence of providing for the ship, without an express power or authority for that purpose; for that the law of merchants had never carried it further than to invest the master with a power of mortgaging, or charging the ship, or cargo, with such money; that, in the present case the money could not be laid out by the appellant or his factors, upon the credit of *Sir Humphrey Jarvis*, not only because he was a total stranger to them, but principally because he had, for two years before, failed in his circumstances, and lost his credit; nor was it even
 " pretended

“ pretended that Sir *Humphrey* ever gave any authority to the
“ master to take up money otherwise than on bottomry : that if
“ Sir *Humphrey*’s person or estate was in all events liable to make
“ good this 789*l.*, besides the 200*l.* advanced on the bottomry
“ bond, and which, in case the ship had returned safe to *Bristol*,
“ he would have been answerable for, he must of necessity have
“ been a very great loser, as the ship cost at first but 700*l.*, and her
“ freight in that event would not have brought above 600*l.*; and
“ therefore, if Sir *Humphrey* himself had been at *Jamaica*, he
“ never would have consented to take up money for preserving
“ that which would have been so much to his loss : and that the
“ appellant’s interest in the ship, by having 200*l.* on bottomry
“ at a large interest, to be paid on her return, was much greater
“ than Sir *Humphrey*’s; and therefore whatever money was laid
“ out in *Jamaica*, ought to be considered as laid out on the ac-
“ count of the appellant, but yet to be discounted out of the ship
“ and freight, so far as it would extend, on its return.” The
House of Lords thought the owner personally responsible, if the
allegations of *Cary*, as to the necessity of the expenditure, were
true; and directed a trial by jury in the Court of Common Pleas,
in *Ireland*, to ascertain whether any, and what sums of money were
necessarily laid out by, or by the order of, *Cary* for the payment of
seamen’s wages, provisions, or otherwise for the necessary repairs
and use of the ship during the voyage; and decreed those sums to
be paid to *Cary*, and directed the Lord Chancellor of *Ireland* to
order the necessary steps for the trial of the cause. The cause
was accordingly tried at the bar of the Court of Common Pleas in
Ireland, and the jury declared by their verdict that nothing had
been necessarily expended for these purposes by, or by the order
of, *Cary*. *Cary* applied to the Lord Chancellor, who ordered a se-
cond trial, and the cause was again tried at the bar of the Court of
Common Pleas in *Ireland*, before another jury, who gave the
same verdict; and the Lord Chancellor thereupon dismissed *Cary*’s
suit, with costs from the time of the judgment of the House of
Lords. Upon this *Cary* again appealed to the House of Lords;
but no person appearing before the House to support his appeal, at
the day appointed, the House dismissed it with costs.

3. Of Freight.

The contract for the conveyance of merchandize is, in its nature, an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will, in general, derive no benefit from the time and labour expended in a partial conveyance, and, consequently, be subject to no payment whatever, although the ship may have been hired by the month or week. (q) The cases in which a partial payment may be claimed, are exceptions to the general rule, founded upon principles of equity and justice, as applicable to particular circumstances. On the other hand, an interruption of the regular course of the voyage happening, without the fault of the owner, does not deprive him of his freight, if the ship afterwards proceed with the cargo to the place of destination, as in the case of capture and recapture. (r) In such a case, however, there will be a deduction for salvage: and if the ship were hired by the week or month, it may be doubted whether the merchant be chargeable for the period of detention. (s) But although the delivery of goods at the place of destination is, in general, necessary to entitle the owner to the freight, yet with respect to living animals, whether men or cattle, which may frequently die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said, (t) that if there be no express agreement whether the freight is to be paid for the lading, or for the *transporting* them, freight shall be paid as well for the dead as for the living; if the agreement be to pay freight for the lading them, their death certainly cannot deprive the owners of the freight: but if the agreement be to pay freight for *transporting* them, then no freight is due for those that die on the voyage, because, as to them, the contract is not performed. These distinctions are found in the civil law, and adopted by all the writers on this subject. (u) In this country it is also said (v) to be not unusual to pay for goods shipped for the *East* or *West Indies*, at the time of the shipment. But this payment, although commonly called freight, is not strictly or properly so

(q) *Abbott*. 254. (r) 3 *Rob. Ad. Rep.* 101. 1 *Bos. and Pul.* 637.
 3 *Bos. and Pul.* 420. 431. *Abbott*. 255. (s) 3 *Bos. and Pul.* 405.
 (t) *Molloy*, bk. 2. ch. 4. sec. 8. (u) *Abbott*. 256. (v) *Ibid.*

denominated;

denominated; that word denoting the price rather of actual carriage, than of receiving goods in order to be carried: and therefore, in a case (w) before the Court of *Common Pleas*, the Court, admitting that an action might be brought for money agreed to be paid for receiving goods on ship-board, in order to be transported, decided that such money could not be sued for or recovered by the name of *freight*. If a pregnant woman be delivered during the voyage, no freight is due for the infant. (x)

When goods are sent in a general ship, the amount of the freight is either settled by the agreement of the parties, or by the usage of the trade. In the case of a charter-party, if the stipulated payment be a gross sum for an entire ship, or an entire part of a ship, for the whole voyage, the gross sum will be payable, although the merchant have not fully laden the ship. (y) And if a certain sum be stipulated for every ton, or other portion of the ship's capacity, for the whole voyage, the payment must be according to the number of tons, &c. which the ship is proved capable of containing, without regard to the quantity actually put on board by the merchant. (z) On the other hand, if the merchant has stipulated to pay a certain sum *per cask*, or bale of goods, the payment must be, in the first place, according to the number of the casks, or bales shipped and delivered; and if he has further covenanted to furnish a complete lading, or a specific number of casks, or bales, and failed to do so, he must make good the loss which the owners have sustained by his failure, to be settled, in case of disagreement, by a jury, who will take all the circumstances into their consideration. (a) Where a ship hired to go beyond sea, to fetch home a cargo, for which a certain rate *per ton* was to be paid, nothing being payable for the outward voyage, was forced to return in ballast, the merchant's factor having no goods to put on board, the Court of *Chancery* decreed payment of the freight. (b)

If an entire ship be hired, and the burthen thereof expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton, and of goods which he shall load on board, but do

(w) *Blakey v. Dickson*. 2 *Bos. and Pul.* 321.

(x) *Molloy*, bk. 2. ch. 4. sect. 8.

(y) *Abbott*. 256.

(z) *Ibid.* 257.

(a) *Abbott*. 257.

(b) *Westland v. Robinson*, cited in 2 *Vern.* 212.

Abbott 257.

not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped. (c)

The owner is entitled to freight on goods delivered to and received by the merchant at the place of destination, though they happen to be greatly damaged by a peril of the sea; and the owner in such case is not answerable for the expence incurred in endeavouring to remove the injury occasioned by the salt water. (d)

So, in the case of *Lutwidge v. Grey*, (e) the merchant was held liable to pay the freight of tobacco, saved from shipwreck, and accepted by him, although part was so much damaged as to be of no value.

It appears doubtful whether the merchant, in the cases just cited, was bound to receive the goods thus damaged, or whether he was not at liberty to abandon them when brought to the place of destination, and by so doing to have discharged himself from the freight. It is observed, (f) that, upon this question, different doctrines and opinions have prevailed, and there is no judicial decision in our books: although in some cases between the merchant and his insurer it has been admitted that the freight was payable, notwithstanding the goods were so much damaged that their value fell short of its amount. But it is necessary to distinguish the causes from which the deterioration may have proceeded. If it had proceeded from the fault of the master or mariners, the merchant is entitled to receive a compensation, and, of course, he is not answerable for the freight, except by way of deduction from the amount of the compensation. On the other hand, if it have proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of a ship, the merchant must bear the loss, and pay the freight; for the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event.

(c) *Lady James v. East India Company*, Sit. at Guildhall, after Mich. Term 1789. Coram Lord Kenyon. Abbott, 257.

(d) *Hotham v. East India Company*, Doug. 272.

(e) *Determined in the House of Lords*, 23 Feb. 1733. Vide post. 347.

(f) Abbott 264 to 275. And see the several authorities there quoted.

In our *West India* trade, the freight of sugar and molasses, is said, (g) to be regulated by the weight of the casks at the port of delivery here, which, in fact, is in every instance less than the weight at the time of the shipment; and therefore the loss of freight occasioned by the leakage, necessarily falls upon the owners of the ship by the nature of the contract.

If, upon an agreement between the owner and merchant, that the ship shall sail to a particular port abroad, and there receive and load a full and complete cargo of goods, the ship sails, and arrives, and is ready to receive her cargo, but the merchant is prevented from loading her in consequence of a prohibition to export goods, the owner, notwithstanding such prohibition, is entitled to the amount of the freight.

Thus, in the case of *Blight and others v. Page*, (h) which was an action upon a memorandum for a charter-party: and by the memorandum it was agreed between the plaintiffs, who were owners of the ship *Favourite*, and the defendant, that the ship, being tight, &c. should with all convenient speed sail and proceed to *Liebau*, or so near thereto as she could safely get, and there load, from the factors of the defendant, a full and complete cargo of *barley*, in bulk not exceeding what the said ship could reasonably stow and carry over and above her tackle, &c.; and being so loaded, should therewith proceed to *Berwick*, or so near thereto as she could safely get, and deliver the same, on being paid freight at and after the rate of 8*s.* 6*d.* per quarter, with two-thirds port charges, and pilotage as customary, (restraints of princes and rulers during the said voyage always excepted,) one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in two months following. Thirty running days to be allowed the said merchant, if the ship was not sooner dispatched, for loading the said ship at *Liebau*, and unloading at *Berwick*, and ten days on demurrage, over and above the said laying days, at 3*l.* per day.

The *Favourite* sailed on her voyage, and proceeded to *Liebau*; but immediately on her arrival in the roads of that place, the cap-

(g) *Abbott*. 269. (h) *Sittings at Guildhall after Mich. T. 1801.*
see *Lord Kenyon, cited in 3 Bos. and Pul. 295. n. a.*

tain was informed by the factors of the defendant, that the *Russian* Government had prohibited the exportation of *barley*, and that it was therefore out of their power to furnish the intended cargo. The captain, however, entered the port of *Liebau*, and after continuing there forty-nine days, returned in ballast to *Berwick*.

The action was brought to recover 45*l.* for freight, 27*l.* 18*s.* for charges, and 30*l.* for ten days demurrage.

In support of the action it was argued, by the plaintiff's counsel, that the exception of the restraints of rulers and princes was only applicable to the owners, and did not therefore excuse the shippers.

For the defendant it was urged, 1st, that the exception was applicable both to owners and shippers: and 2d, that as the prohibition of the *Russian* Government equally prevented the captain from sailing with the cargo, as the shippers from loading it on board, the averment in the declaration that the plaintiffs were ready to perform their part of the contract, was not true; and, 3dly, that there was no pretence for demanding demurrage, since it was the fault of the captain himself to remain at *Liebau* after the notice which he had received.

Lord *Kenyon*, Ch. J. said, "I am decidedly against the defendant upon the point of law. It is said in Co. Litt. 209. that if a man be bound in an obligation to A, conditioned to enfeoff B., a stranger, and B. refuse, the obligation is forfeited; for the obligor has taken upon him to make the feoffment. The reason of this is clear: if a man undertakes what he cannot perform, he shall answer for it to the person with whom he undertakes. I am always desirous to apply the settled principles of the law to the regulation of commercial dealings. With respect to the charge for demurrage, as it appears that notice was given before the captain entered the port that the factor could not furnish a cargo, there is no pretence for making the plaintiffs liable."

A verdict was accordingly entered for the plaintiffs for 48*l.* 18*s.* for the freight and charges only.

But, if a *British* merchant charter a *Swedish* ship, on a voyage to *St. Michael's*, for a cargo of fruit, and the charter-party contain the usual exception against the restraint of princes, and the ship be prevented from reaching *St. Michael's* within the fruit season, by an embargo laid on *Swedish* vessels by the *British* Government,

the

the *Swedish* owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the *British* merchant. (i)

1. *Of the Apportionment of Freight.*] An apportionment of freight is usually made in two instances, *first*, when the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination: and, *secondly*, when the ship has not performed the whole voyage, but the master has delivered the goods to the merchant at a place short of the port of destination. (k)

When the ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage, the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight: but if he is unable, or if he declines to do this, and the goods are there received by the merchant, the general rule of the maritime law is, that freight shall be paid according to the proportion of the voyage performed, *pro rata itineris peracti*. (l)

In the case of *Lutwidge v. Grey*, (m) it appeared that *Lutwidge*, the owner of a ship called the *Wharton*, of *Whitehaven*, let his ship by a charter-party to *Archibald Grey*, and others, merchants at *Glasgow*, for a voyage from *Glasgow* to *Maryland* or *Virginia*, and back from thence to *Glasgow*, and was to receive freight from them for the homeward cargo only, at the rate of *8l. 12s. per ton* of tobacco, computing four hogheads to the ton; one half to be paid immediately after the ship's discharge at *Glasgow*, and the other half within six months after such discharge. The ship failed to *Virginia*, and there delivered her outward cargo, and took on board, from the merchant's factor, a cargo of tobacco, consisting of 199 hogheads, part of which was their property; the residue belonged to other persons, and was put on board by the factor to complete the lading, in pursuance of directions given to him for that purpose by his principals, in case the outward cargo should not enable him to purchase a full lading on their

(i) *Touteng and another v. Hubbard*, 3 *Bos. and Pul.* 291.

(k) *Abbott*. 274. (l) *Ibid.* 276. (m) *Determined in the House of Lords*, 23d Feb. 1733. *Abbott*. 280. This case is also cited in *Luke v. Lyde*, 2 *Bur.* 882. and 1 *Bl. Rep.* 190.

account. *Grey* and Co. insured their part of the cargo with persons living at *Bristol*; the other part was not insured. On the return homeward, the ship was unfortunately cast away at *Youghall*, in *Ireland*, which is within a very short distance of *Glasgow*, and part of the cargo, to the amount of 163 hogsheds, was saved by the assistance of the officers of the customs at *Youghall*, and deposited in the custom-house there. *Lutwidge*, the owner, as soon as he knew of the misfortune, informed *Grey* and Co. of it, and told them he should provide another ship to transport the tobacco which was saved. *Grey* and Co. abandoned their part of the cargo to their insurers, and indorsed over the bills of lading to them. *Lutwidge* provided another ship at *Youghall*, but the insurers took the part of the cargo abandoned to them, and conveyed it to *Bristol*. The agent of the proprietors of the other part of the cargo was willing to have laded it on board the ship thus provided, if the master thereof would sign bills of lading to deliver it at *Glasgow*, in conformity with the original charter-party; but the master refused to give such bills of lading, or to oblige himself to deliver it at *Glasgow*, offering only to give receipts, obliging himself to deliver it in *Great Britain*. And the agent suspecting that he meant to take it to *Whitehaven*, and not to *Glasgow*, refused to deliver it to him upon those terms, and sent it by another vessel to *Glasgow*, where several hogsheds were found so much damaged, that they were not entered at the custom-house, but burned at the king's Isles there. *Lutwidge* brought an action against *Grey* and others, for his freight according to the charter-party, in the Court of *Admiralty* in *Scotland*. On their part it was insisted that the contract of affreightment was dissolved by the shipwreck, and that there remained only a demand in equity for freight; that the demand could not be made against them, who had not taken the goods into their possession, but must be made for part against the insurers at *Bristol*, and for the residue against the proprietors of that residue: that this demand could only be in proportion to the value of the goods saved, after deduction of salvage and charges; and that at all events it could only be for the proportion of the voyage to *Youghall*, because the master of the ship refused to sign bills of lading, and engage to deliver the tobacco at *Glasgow*. The Judge of the Court of *Admiralty* decreed, that the full freight was due from *Grey* and Co. for the part of the cargo saved, but none for the part lost, and that the full freight was due, although the goods were not carried to *Glasgow*, because *Lutwidge* had another ship

ship ready to transport them thither, and there was no occasion for any new bills of lading, while the former bills of lading subsisted. From this judgment *Grey* and Co. appealed to the *Lords of Session in Scotland*, who, by their interlocutor decreed, "That the contract of affreightment was dissolved by the total loss of the ship, albeit some of the shipwreck goods were saved out of the shipwreck; and found that the freighters indorsing the bills of lading to the insurers did not subject the freighters to any freight for the goods recovered by the insurers, but found the merchants liable to the freight *pro rata itineris* of such of the goods as were brought to *Glasgow*, notwithstanding some of the tobacco was found damaged, and burned there." This decree, or interlocutor, was, upon the petition of *Lutwidge*, reviewed by the Lords of the Session, but affirmed by them. Hereupon *Lutwidge* appealed to the highest tribunal of the country, The *British House of Lords*: the House of Lords "Reversed the decree or interlocutor of the Lords of Session, complained of by the appellant, and the affirmance of that interlocutor: and declared, that the respondents, *Grey* and others, were liable for the full freight of such of the goods as were given up to the insurers, and for the freight *pro rata itineris* of such of the goods as were brought to *Glasgow*, notwithstanding some of the tobacco were found damaged, and burned there."

So, in the case of *Luke* and another v. *Lyde* (n) which was an action of *assumpsit* (o) for the freight of goods carried in the plaintiff's ship by sea, without mentioning from or to what place. The facts of the case were these: *Lyde* shipped a cargo of 1501 quintals of fish, at *Newfoundland*, on board the ship *Sarah*, belonging to *Luke* and others, to be carried to *Lisbon*: the freight was to be at the rate of *two shillings* per quintal. The price of the cargo at *Newfoundland* was *ten shillings and sixpence* per quintal. *Luke* and others also had on board a quantity of fish, their own property. The ship set sail on the 27th of *November* 1756, and having proceeded seventeen days on her voyage, was taken on the 14th of *December* by a *French* ship, within four days sail of *Lisbon*, but retaken

(n) 2 Burr 882. 1 Bl. Rep. 195. S. C. Abbott. 283. (o) The form of action, though not mentioned in the report, is ascertained to be as here mentioned. Vide Abbott, 290.

on the 17th of *December* by an *Engliſh* privateer, and brought, on the 29th, into the port of *Bideford*, in *Devonſhire*. The *French* ſhip took out the maſter and all the crew, except one man and a boy. *Lyde* took his goods of the recaptors, and paid *five ſhillings* per quintal ſalvage, the value of the fiſh being then eſtimated at ten ſhillings per quintal. The fiſh could not be ſold at all at *Bideford*, nor at any other port in *England*, for more than ten ſhillings per quintal, clear of charges and expences; and it was ſuppoſed by every perſon that the fiſh would be diſpoſed of to the greateſt advantage at *Bilboa* in *Spain*, to which place *Lyde* ſent it without delay; but it fetched there only five ſhillings and ſixpence per quintal, clear of freight and expences, being little more than one third of the prime coſt and ſalvage. The freight from *Bideford* to *Liſbon* was higher than from *Newfoundland* to *Liſbon*. The owners, *Luke* and others, abandoned the ſhip to their inſurers, and never offered to convey the goods to *Liſbon*, nor were ever required to do ſo by *Lyde* the merchant. The Court decided, that the plaintiffs ſhould recover freight, as for half the quantity of the cargo ſhipped, conſidering the other half to be abſolutely loſt by the expence of ſalvage, and in the proportion of *ſeventeen* days, during which the ſhip had proceeded on the voyage, to *twenty-one* days, within which the voyage would have been completed, if the capture had not happened, that is, 6*ol.* 14*s.* being $\frac{17}{21}$ of 75*l.*, the half of 150*l.* And Lord *Mansfield* ſaid, “If a freighted ſhip becomes accidentally diſabled on its voyage, without the fault of the maſter, the maſter has his option of two things: either to reſit it, (if that can be done within convenient time,) or to hire another ſhip to carry the goods to the port of delivery. If the merchant diſagrees to this, and will not let him do ſo, the maſter will be entitled to the whole freight of the full voyage; and ſo it was determined in the Houſe of Lords, in the caſe *Lutwidge* againſt *Grey*. As to the value of the goods, it is nothing to the maſter of the ſhip whether the goods are ſpoiled or not, provided the freighter takes them: it is enough if the maſter has carried them; for by doing ſo he has earned his freight; and the merchant ſhall be obliged to take all that are ſaved, or none: he ſhall not take ſome and abandon the reſt, and ſo pick and chuſe what he likes, taking that which is not damaged, and leaving that which is ſpoiled or damaged. If he abandons all, he is excuſed freight and he may abandon all, though they are not all loſt. (I call the freighter the merchant, and the other the maſter, for the clearer diſtinction.)

Now

Now here is a capture without any fault of the master, and then a recapture; the merchant does not abandon, but takes the goods, and does not require the master to carry them to *Lisbon*, the port of delivery. Indeed, the master could not carry them in the same ship, for it was disabled, and was itself abandoned to the insurers of it; and he would not desire to find another, because the freight was higher from *Biddeford* to *Lisbon* than from *Newfoundland* to *Lisbon*. There can be no doubt but that some freight is due; for the goods were not abandoned by the freighter, but received by him of the re-captor. The question will be, What freight? The answer is, a rateable freight; i. e. *pro rata itineris*.

“ If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion *pro rata*, of the former part of the voyage. I take the proportion of the salvage here to be half of the whole cargo upon the state of the case, as here agreed upon: and it is reasonable that the half here paid to the re-captor should be considered as lost. For the re-captor was not obliged to agree to a valuation, but he might have had the goods actually sold, if he had so pleased, and taken half the produce; and therefore the half of them are as much lost as if they remained in the enemy's hands. So that half of the goods must be considered as lost, and half as saved. Here the master had come *seventeen* days of his voyage, and was within four days of the destined port when the accident happened. Therefore he ought to be paid his freight for $\frac{1}{4}$ parts of the full voyage, for that half of the cargo which was saved.”

His Lordship, after citing most of the authorities on this subject, concluded thus: It is quite immaterial what the merchant made of the goods afterwards; for the master hath nothing at all to do with the goodness or badness of the market; nor indeed can that be properly known till after the freight is paid; for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter in the case of *Lutwidge* and *Grey*, in the House of Lords; and yet there the tobacco was damaged very greatly, even so much that a great part of it was at the scales at *Glasgow*.”

So,

So, in the case of *Baillie v. Mendigliani*, (p) where it appeared that a ship sailed with goods from *Nevis* for *Bristol*, but on the voyage was taken, and carried into *France*, and condemned there. On appeal, the sentence of condemnation was reversed, and restitution awarded, but before that time the ship and cargo were sold. The merchants received the price of the goods, and paid freight to the master *pro rata itineris*: and having caused the goods to be insured before the commencement of the voyage, brought an action against the insurers to recover from them the freight so paid to the master. The court held, that this payment could not be recovered upon this insurance. But Lord *Mansfield* said, "As between the owners of the ship and cargo in case of a total loss, no freight is due; but as between them no loss is total, where part of the property is saved, and the merchant takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was certainly due pro rata itineris."

But, in the case of a *Swedish* ship, (q) which, being chartered to go from *Plymouth* to *Radflow*, (a very small distance,) there to take a cargo of pilchards for *Venice*, failed to *Radflow*, and took in the cargo, and proceeded a few days on the voyage; but, meeting with bad weather, and becoming leaky, returned to *Falmouth*, and was there stopped by an embargo imposed on the vessels of *Sweden*, in consequence whereof the cargo was taken out and restored to the merchants, who were *British* subjects; the learned Judge of the Court of Admiralty decreed, that no freight was due, but held that if any expences had been incurred by the ship on account of the cargo, they must be paid.

In the case of *Cook v. Jennings*, (r) which was an action of covenant on a charter-party of affreightment dated 2d of *August*, 1796, by which the plaintiff let his ship, the *Resolution*, to the defendant to freight, from *Liverpool* to *Wjburgb*, and back to *Liverpool*, and agreed that the master should take on board a cargo of salt to *Wjburgb*, and after delivering the same there, should take on board there a cargo of deals; in consideration of which the de-

(p) *Park on Insurance*, Chap. 2, Abbott. 288. — *The Copenhagen* Mening, 1 Rob. Ad. Rep. 289. S. C. — *also* Abbott. 289. S. C. — *1840*
(r) 7 Term Rep. 381.

defendant agreed to pay to the plaintiff, "in full for the freight and hire of the ship for the said voyage, at and after the rate of 7l. per standard hundred for deals delivered at *Liverpool*, &c. the freight to be paid one-fourth in cash on her arrival, and the remainder by an acceptance on *London* at four months' date." The plaintiff in support of his action alledged, that the ship, after carrying the cargo of salt to *Wyburgh*, took on board there a cargo of deals, &c. and proceeded on her voyage for and towards *Liverpool*, &c.; and whilst the ship was so proceeding, and after she had performed a great part of her voyage, but before her arrival at *Liverpool*, the ship was, by the force and violence of the winds and waves, wrecked and cast upon the shore, and thereby became incapable of proceeding any further on the voyage, by reason whereof it became necessary to put the cargo of deals on shore for the preservation thereof; "which said cargo so unladed the defendant accepted and received into his hands and possession, and sold and disposed of the same to his own use, whereby he became liable to pay to the plaintiff a proportionable part of the said freight and hire of the ship for the carriage of the said cargo of deals, for such part of the voyage from *Wyburgh* to *Liverpool* as the ship performed;" which proportionable part amounted to the sum of 800l.; and for the recovery of that sum the action was brought.

These facts were admitted to be true, and it was admitted that no part of the cargo was conveyed to *Liverpool*. The plaintiff did not pretend that he had offered to convey the deals thither, nor did the defendant assert that he had required him to do so. The Court of *King's Bench* decided, that the plaintiff could recover nothing in the present action. Lord *Kenyon*, Ch. J. said, "We are called upon to decide in this action according to the rules of law, on a contract between these parties, which was made in the most solemn manner by a deed under seal; though, indeed, I do not know that it would have made any difference, if the question had arisen on a precise formal contract not under seal. By the terms of this agreement the defendant engaged to pay so much on delivery of the goods at *Liverpool*, one-fourth in cash on her arrival, and the remainder by an acceptance at four months; but the goods never arrived; then at what time were those bills to be dated? We do not fit here to make, but to enforce contracts: and the question put to us is, whether the freight is to be paid under this contract, though the ship never arrived, but was lost

before her arrival at *Liverpool*? Upon which I cannot bring my mind to doubt. The case of *Luke v. Lyde*, is very distinguishable from the present, that being the case of a *general assumpsit* for the freight of goods, in which Lord *Mansfield* states the marine law on this subject. But what has the case of an implied contract to do with an express contract? Lord *Coke* says, *expressum facit cessare tacitum*. Here the parties are bound by a precise agreement. Then it is suggested, that we ought not to give effect to this contract, because it is unreasonable: but we are to decide according to the contract of the parties; and the law says, that if A. covenant to enfeoff B. A. is not released from his covenant, though B. will not accept livery of seisin, unless the act be frustrated by the act of the covenantee. It is not necessary now to determine whether or not the plaintiff might not have brought an action of *assumpsit*; it will be time enough to decide that case whenever the question arises. But here the question is, whether or not he can enforce payment of the money under this contract, not having carried the goods to *Liverpool*, and the defendant having only undertaken to pay on their delivery at *Liverpool*; in answer to this action the defendant has a right to say, *non hoc in fœdera veni*."

The other Judges concurred in the same opinion; Mr. Justice *Gryse* cited the case of *Bright v. Cowper*, (s) as a direct authority against the plaintiff.

Lawrence, J. said: "I agree with the plaintiff's counsel, that whether the contract be by parol or under seal, the operation of the law on it is equally the same. When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another; and having performed the voyage, he is then entitled to his freight: but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties: but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at *Liverpool*. That event

(s) 1 *Broom*, 21. But see *Abbott*, 294.

has not happened, and therefore the plaintiff cannot recover in this form of action."

As the right to freight does not commence until the ship has broken ground and begun the voyage, no partial payment can be claimed for goods laden on board, if even without the fault of the master, the ship is prevented from actually setting forth on the voyage.

Thus, in the case of *Curling v. Long*, (1) where a ship, which took on board a cargo in *Salt River* in *Jamaica*, at a very great expence to the owners (who by the usage of the *West India* trade fetch the cargoes from the shore at *their* expence,) actually cleared out for the voyage, but while waiting for convoy, was cut out of the river by two *French* privateers, and being afterwards retaken was carried into *Port Royal*, where the cargo was sold under an order of the Court of *Admiralty*, and the proceeds thereof, with the deduction of salvage, paid to the merchants. It was decided that nothing could be claimed of the merchants, although each of the Judges expressly recognized the rule of the marine law as to the apportionment of freight *pro rata itineris*; the Court holding, that in this case there had been no commencement of the voyage; and therefore no freight could be due; and that as the freight was by the contract the only remuneration of all the services performed by the owners, they were not entitled to any recompence for the expence of taking the goods on board.

It is observed, (v) that it often happens that a ship is hired by a charter-party to sail from one port to another, and from thence back to the first, as for instance, from *London* to *Leghorn*, and back from thence to *London*, at a certain sum to be paid for every month, or other period of the duration of the employment. Upon such a contract, if the whole is one entire voyage, and the ship sail in safety to *Leghorn*, and there deliver the goods of the merchant, and take others on board to be brought to *London*, but happen to be lost in her return thither, nothing is due for freight, although the merchant has had the benefit of the voyage to *Leghorn*; but if the outward and homeward voyage are distinct, freight will be

(1) 1 Bos. and Pul. 634. See also *Abbott*, 296.

(v) *Abbott*. 296.

due for the proportion of the time employed in the outward voyage.

Thus, in the case of *Mackrell v. Simond and Hankey*, (u) which was an action of covenant on a charter-party. In the first count of the declaration the plaintiff claimed freight for the period of the voyage to *Grenada*; in the second up to the day of the loss of the ship. The facts, as they appeared upon the declaration, were these: *Mackrell*, the owner of the ship the *Richard*, lying in the river *Tbames*, let his ship to freight by a charter-party dated 9th of *March*, 1774, to *Simond and Hankey* by the month, "for such time as she should be employed in performing a voyage from *London* to *Plymouth*, and the island of *Grenada*, and from thence back to *London*," and whereby the plaintiff covenanted, that the ship should, pursuant to the order and directions of the freighters, their factors or assigns, prosecute and perform the voyage above mentioned, (the danger and perils of the sea, and the restraint of princes and rulers excepted,) and should in such outward and homeward voyage load and unload all lawful goods;" and that his ship's company and boats should aid and assist in unloading and reloading the said ship's cargoes, as customary at the island of *Grenada*, and that he would pay all port charges and pilotage. In consideration whereof the defendants covenanted, "that they would load and unload the ship, and give the master proper orders in respect thereof: and that the ship should be discharged out of her said monthly employ on the delivery of her homeward cargo in *London*, and also should and would well and truly pay or cause to be paid to the said owner, his executors, administrators, or assigns, in full for the freight and hire of the said ship, at the rate 110*l.* sterling, per calendar month, for all such time as the said ship should be taken up in performing the voyage afore-said; to commence and be accounted from the day of the date of the said charter-party, and to end and determine on the day of the discharge of the homeward cargo at *London*, and to be paid one-third part thereof on her report inwards at the custom-house, *London*, and the remaining two third parts thereof, in two calendar months then next following."

In pursuance of this charter party the ship took in goods belonging to the merchants *Simond and Hankey* at *London*, sailed with

(u) *K. B. Trin. T. 16 Geo. III. Abbot. 298.*

them to *Plymouth*, and there took in other goods also belonging to them, and from thence proceeded to *Grenada*, and there landed the cargo; and received another cargo from the merchant's factor there, with which she set sail for *London*; but on the way was lost by tempest. The voyage to *Grenada* occupied *three* months; and *five* months elapsed in the whole before the loss of the ship.

After the misfortune the owner brought an action against the merchants, claiming of them the payment of freight either for three or for five months, which made the difference between the first and second counts. The defendants demurred to both counts, insisting that nothing was due. The Court, however, decided that freight was payable for *three* months, the period of the outward voyage; and judgment was accordingly given for the plaintiff on the first, and for the defendant on the second count. Lord Mansfield delivered his judgment to the following effect: "This question depends upon the construction of the charter-party. If the parties have expressed their meaning defectively, the Court must be guided by the nature of the thing. The charter-party puts no case but that of a prosperous voyage out and home; it provides for freight on the supposition that the ship will arrive safe and report her cargo; no provision is made for any other case. If the ship be cast away on the coast of *England*, and never arrive at the port of *London*, yet if the goods are saved, freight shall be paid, because the merchant receives advantage from the voyage. This is not expressed by the charter-party, but arises out of the equity of the case. Freight is the mother of wages; the safety of the ship the mother of freight: that is the general rule of the maritime law. If there be one entire voyage out and in, and the ship be cast away in the homeward voyage, no freight is due, no wages are due; because the whole profit is lost, and by express agreement the parties may make the outward and homeward voyage one. Nothing is more common than two voyages; whenever there are two voyages, and one is performed, and the ship is lost in the homeward voyage, freight is due for the first. Here the outward and homeward voyage are so called in the charter-party. The cargo is loaded outwards, and the owner covenants to pay port charges on the outward voyage. The whole of that voyage was completed: port duties are incurred and paid. Nothing however is due on the homeward voyage, though the ship might be out a month."

But in the case of *Byrne and others v. Pattinson*, (w) the words of the charter-party being different, a different construction prevailed. *Pattinson*, master and part-owner of the ship *William and Mary*, lying at *Liverpool*, by a charter-party, dated 28th of July, 1794, let the ship to freight to *Byrne and others*, for a voyage intended to be made from *Liverpool* to the island of *Madaira*, and from thence to the island of *Barbadoes*, and from thence back to *Liverpool*, *Greenock*, or *Bristol*, but with liberty for the freighters to order the said vessel from *Barbadoes* to any one other island in the *West Indies*, (*Jamaica* excepted), they paying all pilotage and port charges incurred thereby. And the said freighters accordingly by the said charter-party took and hired the same in manner following, (that is to say), "that the master should immediately receive and take a cargo on board the said vessel from the freighters, and the said vessel so laden should immediately proceed directly to *Madaira*, and deliver such goods as should be ordered by the said freighters, and also should receive and take on board the said vessel at *Madaira*, such other goods as the said freighters might think proper to ship, and that being done, the master should proceed with the said vessel to *Barbadoes*, and there make delivery of her cargo, and receive and take on board a cargo from the freighters, and being loaden therewith, should with the first opportunity proceed directly to the port of *Liverpool*, *Greenock*, or *Bristol*, and there deliver the same cargo, and so end the said intended voyage." In consideration of which the said freighters thereby promised and agreed, amongst other things, "to pay to the defendant, in full for the freight and hire of the ship for the said voyage, the sum of 136*l.* 10*s.* per calendar month for six months certain, to commence in eight days after she was ready to receive the cargo at *Liverpool*, and to continue until she was discharged at *Liverpool*, *Greenock*, or *Bristol*, together with two-thirds the amount of all pilotage and port charges that might accrue, and be paid during the course of the said voyage, with customary primage; payment thereof to be made in manner following, viz. 136*l.* 10*s.* to be advanced before the sailing from *Liverpool*, by a good bill at three months' date, and what cash might be required for the said vessel's disbursements and port charges at *Madaira* and *Barbadoes*, to be paid in part of the said freight, and the remainder of the said freight should become due

(w) *K. B. Trin. T. 37 Geo. III. Allen, 301.*

and be paid on the final discharge of the said vessel at *Liverpool*, *Greenock*, or *Bristol*, by good bills on *London* at three months date." The period of computation commenced on the 7th of *August*, 1794; on the 19th of that month the ship sailed from *Liverpool* for *Madeira*, freighted with goods, and arrived there on the 19th of *September*, and discharged at that place by the 4th of *October*, as many of the goods as were to be delivered there, and took on board on account of the merchants ninety pipes of wine, and sailed from thence on the 9th of *October* for *Barbadoes*, but on the 10th of *November* was captured on the way thither. The merchants had paid 135/. part of the freight for the first month, and also the port charges and disbursements for the ship at *Madeira*. *Pattinson* now claimed in the present suit further freight from the 7th of *September* to the day of the ship's capture, or to the day when she had completed the delivery at *Madeira*, or freight for the goods delivered there at the usual rate of conveyance, allowing the 135/. But the Court held, that he had no claim whatever." On his part it was contended, that there ought to be an apportionment in this case; and a passage cited from *Malynes*, (x) relating to a ship lost at *Dover*, was quoted as an authority in his favour. But Lord *Kenyon*, Ch. J. said: "In that case the goods came to the merchant's hands, and the owner of the ship might have provided another ship to carry them to *London*. In this case, by the terms of the contract, the freight is to become due at *Liverpool*, and therefore it cannot be claimed before."

.2 Of the Payment of Freight, and against whom it is recoverable, &c.] The time and manner of payment of freight are frequently regulated by express stipulations in a charter-party, and when that is done, the payment must be according to the agreement. But if there be no express stipulation, the goods conveyed generally remain as a security until the freight is paid; for the master is not bound to deliver them without payment: (y) and if by the regulations of the revenue the goods are to be landed and put into the King's warehouse, if the duties are not paid, the master may enter them in his own name, and thereby preserve his lien. And as he has this power to enforce payment, so it very often becomes his duty to exercise it; for where goods are consigned by one merchant to another it might often be highly prejudicial to the consignee to be called upon

(x) Page 98.

(y) Doug. 104. Abbott. 228. 259.

at the ship's return to pay the freight, which he had reason to expect the master would obtain from the consignee. (a) And where an action was brought for freight on a charter-party, by which it was agreed that the goods should be delivered at *London* agreeably to the bills of lading, and by the bills of lading they were to be delivered to a third person on his payment of the freight, and in fact they were delivered to him, but he refused to pay the freight, because the merchant, the defendant, who was the consignee, was indebted to him to a greater amount. Lord *Kenyon*, Ch. J. held, that the freight could not be recovered of the consignee, for the master ought not by the terms of the contract to have delivered the goods without receiving the freight from the consignee. (a) Indeed, if a consignee receive goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay the freight, he by such receipt makes himself debtor for the freight, and may be sued for it. (b)

If a consignee, known as such to the master, sell the goods before they are landed, he and not the buyer is liable to be sued for the freight, although the buyer enter the goods at the custom-house in his own name.

Thus, in the case of *Artaza v. Smallpiece*, (c) which was an action of *assumpsit* brought to recover the amount of the freight of 170 chests of oranges and lemons, which had been shipped in a general ship from *Portugal*, and the bill of lading was to the order of the shipper. The goods had been entered at the custom-house in the name of the defendant, and it was proved, that in general, where the goods are so shipped, to the order of the shippers, that the person in whose name the goods are entered at the custom-house, is considered as liable to the freight; upon which principle the present action had been brought.

To prove this case, a witness was called on the part of the plaintiff, who proved the bill of lading, and the entry at the custom-house to have been made in the name of the defendant; but in the course of his examination it appeared, that the defendant had bought them of one *Haynes*, to whom the bill of lading had

(a) *Abbott*, 259. (a) *Pernose and others v. Wilks*, *Sir. of Hill-Term*, 1790. *coram Lord Kenyon*, *Ibid*.

(b) *Roberts v. Holt*, 2 *New* 443. (c) 1 *Esp. Rep.* 23.

been indorsed and sent by the shipper, which circumstance was known to the plaintiff.

Upon this evidence, it was contended for the defendant, that the action should have been brought against *Haynes*, not against the defendant: that *Haynes* was the consignee, and in that character liable to the freight; and that the custom of making him liable in whose name the goods were entered at the custom-house, could only take place where such person was in fact the consignee, or where the consignee was not known.

But, Lord *Kenyon*, Ch. J. said: "The captain has a right to retain the goods shipped on board his vessel till he is paid his freight: if he parts with the possession of them, he must then resort to his contract. In the case of goods consigned, the consignee is the person liable to the freight, not the person to whom he sells them: that would be to enhance the price on him as he must be supposed to buy them at a certain price independent of all charges, unless such charges are made part of the bargain. A right of action cannot be transferred from the person liable, to another, by such persons own act. He therefore who is first liable must remain so. Here *Haynes* was the consignee, and known to be such to the plaintiff who cannot, by any supposed custom, transfer the liability to the defendant, who is only the purchaser of the goods from him. I am therefore of opinion the plaintiff must be called."

So, the entry of goods at the custom-house, made by a person, who is only agent for the confignor, and known to the master to be acting in that character, does not render such agent liable to be sued for the freight. (d)

The mortgagee of a ship is not entitled to the freight until he actually takes possession of the ship.

Thus, in the case of *Chinnery v. Blackburne*, (e) which was an action of *indebitatus assumpsit* for freight of goods from *Amigua* to *London*. Upon the trial a verdict for the plaintiff was taken, subject to the opinion of the Court of *King's Bench*, on a case which stated, that by an indenture of affignment, dated *January 4th*,

(d) *Ward v. Felton*, 1 *East Rep.* 507.

(e) *K. B. East Term*, 24 *Geo. III.* 1 *B. Bl.* 117. *See Vide Ante* 335.

1783, *Robert Merryfield*, in consideration of 1166*l.* 18*s.*, which he owed to the plaintiff, assigned to her the ship *B. &c.*, in which indenture there was a covenant from the plaintiff to re-assign the said ship, &c. to *Merryfield*, on payment of 1166*l.* with lawful interest, on or before the 10th of *November* then next ensuing; that, at the time of the execution of the deed, the ship was in the river *Thames*, and afterwards sailed to *Portsmouth*, and continued there till the middle of *March* following, in the possession, and under the command of *A. B.*; and that the plaintiff did not then take possession: that *Merryfield* navigated, victualled, and manned the ship, as owner thereof, at his own expence and risk, both from *England* to *Antigua*, and on her return from thence; that *Merryfield* at *Antigua* gave the command of her to Captain *Drysdale*, and sent her to *England*, with orders to the captain to address himself to Messrs. *Dunlop*, of *London*, merchants, who were to sell her according to the directions contained in a letter, in which letter *Merryfield* also said, "Mrs. *Chinnery* has a demand against me " for near 1200*l.* sterling, which I hope to remit shortly to you, or Mrs. *Merryfield*, so as to pay her:" that Messrs. *Dunlop* being applied to as consignees, lent two sums of 50*l.* to Captain *Drysdale*, declaring they should consider him as responsible, in case they should not receive the same by freight, &c.; and that they afterwards received the money from *Drysdale*: that the ship completed the delivery of the cargo on the 27th of *September* 1783; that the plaintiff took possession on the 29th of *September* following, immediately on receiving information of her arrival in the *Thames*; that the defendant had goods from *Antigua* on board, the freight of which amounted to 76*l.* 3*s.* 11*d.*, for the recovery of which the action was brought: that Captain *Drysdale* paid for lights, custom-house dues and for clearing the ship, which the plaintiff repaid him, and also paid his and the mariners' wages for the voyage from *Antigua*, to the amount of 234*l.* 7*s.* 7*d.*, after she took possession of the ship; and that the plaintiff afterwards sold the ship by auction for 710*l.* &c.

The Court determined that the plaintiff was not entitled to the freight.

Lord *Mansfield* said, "The justice of the case struck me forcibly at first, as between the mortgagor and mortgagee: but the mortgagor is no party; the action is brought after the mortgage, against a person who contracted with the mortgagor. This action
must

must be founded on the idea that the mortgagor in possession is the servant and agent for the mortgagee, which is not the case. Till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expences, and he is to reap the profits."

Asbburgh, J. "If the voyage had proved unprofitable, could the mortgagor have recovered against the mortgagee the expence of the outfit? yet this must have been the case if the mortgagee were entitled to the profits."

Buller, J. If the mortgagor be considered as agent, he must be so throughout, and then the mortgagee would be answerable for every loss, damage, &c. The payments by the plaintiff were voluntary, to get possession of the ship free from any liens, and are at most but evidence of the mortgagee's possession.

Where a ship is freighted by the *month*, it is to be understood of a *calendar*, not a *lunar* month. (*f*)

In the case of a general ship, and where there is no charter-party, or other covenant under seal, the freight is recoverable by action of *indebitatus assumpsit*, (*g*) which may be brought either in the name of the master, or his owners; but where it is brought by the latter, they must all be made co-plaintiffs. (*b*)

If the contract for freight be under a charter-party, or other deed, the proper and only form of action is *Debt*, or *Covenant* upon the deed. (*i*)

A. Of Demurrage.

It is commonly agreed between the merchant and owner that the former shall load and unload the ship within a limited number of days after she shall be ready to receive the cargo, and after arrival at the destined port. But it is frequently stipulated that the ship shall, if required, wait a further time to load or unload, or to sail with convoy, for which the merchant shall pay a daily sum. This delay, and the payment to be made for it, are both called *demurrage*. (*k*)

(*f*) *Jolly v. Young*. 1 *Eq. Rep.* 186. (*g*) *Prin v. Shears*, 1 *Pent.* 100. (*b*) *Abbott*. 88. (*i*) *Atty and another v. Parish and another*, 1 *New Rep. C. B.* 104. (*k*) *Abbott*. 178.

1. The word "*days*," used alone in a clause of demurrage for unloading in the river *Thames*, is said (1) to be understood of working days only, and not to comprehend Sundays or holidays, by the usage among merchants in *London*; but it is much better to mention working, or running days, expressly, according to the intention of the parties.

The payment of *demurrage*, stipulated to be made while a ship is waiting for *convey*, ceases as soon as the convey is ready to depart; and such payment, stipulated to be made while a ship is waiting to receive a cargo, ceases when the ship is fully laden, and the necessary clearances are obtained, although the ship may in either case happen to be further detained by adverse winds, or tempestuous weather: and if the ship has once set sail and departed, but is afterwards driven back into port, the claim of demurrage is not thereby revived. (m)

5. Of Passage-Money.

In the case of *Molloy v. Backer*, (n) which was an action of *assumpsit* for passage money. The facts of the case were these: the plaintiff contracted to carry the defendant, his family, and luggage, from *Demerary* to *Flushing*; and in the course of the voyage, within four days' sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the Court of *Admiralty*, and the cargo condemned, and proceedings still pending against the ship, but the defendant and his family were liberated, and their luggage in fact restored to their possession. The Court held, that however the question might be as to the plaintiff's right to recover passage-money upon an *implied assumpsit pro rata itineris*, if the ship were restored; yet pending the proceedings against the ship as prize in the *Admiralty Court*, no such action could be maintained; for *non constat* but that the ship might be condemned, and the freight decreed to the captors.

(1) *Cochran v. Retberg*, 3 *Esq. Rep.* 121.

(m) *Vide Lannoy v. Werry*, 4 *Bro. P. C.* 630. *Jamieson v. Laurie*, 6 *Br. P. C.* 474. *Abb. 182.*

(n) 5 *East Rep.* 316.

6. Of Seamen's Wages.

First, Of the Contract of hiring.] In order to prevent the mischiefs that frequently arose from the want of proper proof of the precise terms upon which seamen engaged to perform their service in merchant ships, it was enacted by 2 Geo. II. c. 36. f. 1. (made perpetual by 2 Geo. III. c. 31.) "That it shall not be lawful for any master or commander of any ship or vessel bound to parts beyond the seas, to carry any seamen, or mariners, except his apprentice, or apprentices, to sea, from any port or place where he or they were entered or shipped, to proceed on any voyage to parts beyond the seas, without first coming to an agreement, or contract with such seamen, or mariners, for their wages; which agreement, or agreements, shall be made in writing, declaring what wages each mariner is to have respectively during the whole voyage, or for so long time as he or they shall ship themselves for; and also to express, in the said agreement or contract, the voyage for which such seamen or mariner was shipped to perform the same, under a penalty of 5*l.* for each mariner carried to sea without such agreement, to be forfeited by the master to the use of *Greenwich Hospital*. (e) And by sect. 2. this agreement is to be signed by each mariner, within three days after he shall have entered himself on board the ship, and is, when signed, conclusive and binding upon all parties. The statute 2 Geo. III. c. 31. f. 2. has extended these provisions to all his Majesty's colonies in *America*,

And by the statute 31 Geo. III. c. 39. a similar agreement in writing is required to be signed by the master and mariners of vessels of the burthen of one hundred tons or upwards, employed in the *coasting trade* from any port or place in *Great Britain*, to any other port or place in *Great Britain*, and going to open sea. And by the 10th section of this act, the agreement need not be stamped,

By the stat. 37 Geo. III. c. 73. f. 1. (which relates to ships trading to the *West Indies*,) it is enacted, "that every seaman who shall desert at any time during the voyage, either out or home, from any *British* merchant ship trading to or from his Majesty's

(e) *Vide the case of Ellsworth v. Woolmore, post.*

colonies and plantations in the *West Indies*, shall, over and above all punishments, penalties, and forfeitures, to which he is now by law subject, forfeit all the wages he may have agreed for with, or be entitled to, during the voyage, from the master or owner of the ship on board of which he shall enter, immediately after such desertion."

And by section 2, of the same act, it is also enacted, "That all and every master or commander of any *British* merchant ship, who shall, from and after the first day of *July* 1797, hire or engage to serve on board his ship or vessel any seaman, mariner, or other person who shall, to the knowledge of such master, have deserted from any other ship, or vessel, shall forfeit and pay the sum of one hundred pounds." It is observed, (p) that as this clause is expressed in general terms, and is not limited to ships engaged in the *West India* trade, either by direct reference to the preamble of the statute, or otherwise, it may probably be held to extend to all cases, and not to be confined to the masters of ships engaged in that trade.

By the third section of the same statute it is also enacted, "That no master, or commander of any merchant ship, or vessel, which shall, from and after the first day of *July* 1797, sail or proceed from any port or place in *Great Britain*, shall hire or engage, or cause or procure to be hired or engaged, any seaman, mariner, or other person, at any port or place within his Majesty's colonies or plantations in the *West Indies*, to serve on board any such merchant ship or vessel, at or for greater or more wages, or hire, for such service, than according to the rate of double monthly wages, contracted for with the seamen, mariners, and other persons hired or engaged to serve on board such ship or vessel, at the time of her then last departure from *Great Britain*, being in the same degree and station in which such seaman, mariner, or other person shall be so hired or engaged, at any such port or place as aforesaid, unless the governor, chief magistrate, collector, or comptroller of such port or place in the said colonies, or plantations, shall think that greater or more wages, or hire, than double the monthly wages aforesaid, should or ought to be given to such seaman, mariner, or other person as aforesaid, and do and shall accordingly authorize or direct the same to be given, by writing under his

hand; that then and in such case the master or commander of such ship, or vessel, shall and may be at liberty to pay, and the seamen, mariner, or other person on board such ship, or vessel, to receive such greater or higher wages as such governor, chief magistrate, collector, or comptroller shall direct as aforesaid; and that all contracts and securities made, entered into, or given, contrary to the intent and meaning of this act, are made null and void, to all intents and purposes."

But by the 10th section of the act it is provided, nevertheless, "That nothing in this act shall extend, or be construed to extend to any contract, or agreement, which shall or may be made with any seaman, mariner, or other person hired or engaged to serve on board any merchant ship or vessel, at any port or place within his Majesty's colonies or plantations in the *West Indies*, who shall, at the time of such hiring, or engagement, produce and deliver to the master and commander of such ship or vessel, a certificate, under the hand of the master or commander of the ship or vessel on board of which such seaman, mariner, or other person had then last served, signed in the presence of one or more witnesses, or witnesses, stating their usual place, or places of abode, thereby declaring or certifying that such seaman, mariner, or other person had been duly discharged from the ship, or vessel, on board of which he had so last served; and which certificate the said master or commander shall grant within three days next after application made to him by such seaman, mariner, or other person, before a witness, or, in default thereof, shall forfeit and pay the sum of twenty pounds, to be levied, recovered, and applied in manner hereinbefore directed; nor to any contract, or agreement, to be made with any seaman, mariner, or other person hired or engaged to serve on board any merchant ship or vessel, which, through necessity, or on account of very hazardous service, or extraordinary duty, require such contract or agreement to be made, and more wages or hire given, and of which necessity, service, or extraordinary duty proof shall be made, on oath, before the chief magistrate, or principal officer of any port or place, or before any justice or justices of the peace of the said colonies, or plantations: and provided also that such seaman, mariner, or other person so hired or engaged to serve on board any ship or vessel so requiring such service, shall not have deserted from the ship or vessel on board of which he had then last served; and provided also that no
greater

greater or higher wages, or hire, shall be given by any master or commander, or taken or received by any seaman, mariner, or other person as aforesaid, except in cases of such necessity, very hazardous service, or extraordinary duty as aforesaid, than after the rate of double the monthly wages, or the wages to be settled or directed by any governor, chief magistrate, collector, or comptroller, as heretofore directed, to be paid or received as aforesaid."

Upon this clause of the statute Mr. *Abbott* observes, (g) "That it is difficult to collect the real intention of the legislature from this long and confused proviso. If, as at first sight appears, it was intended to allow the master to give more than double wages, without the authority of a magistrate, in *two* cases; namely, first, to mariners producing a certificate of discharge from their last ship; and, secondly, in the case of necessity, hazardous service, or extraordinary duty, proved upon oath, to mariners who have not deserted from their last ship; then the *last* part of the clause will be ineffectual. If, on the other hand, it was intended to allow this power to the master only in the case of necessity, &c. so proved, and to mariners who have not deserted, then the *first* part of the clause will be ineffectual."

Soon after the passing of this statute, it was decided, that a licence given by a magistrate in the *West Indies* to the master of a ship, "to procure men on such terms as he could to navigate the ship home," was not a compliance with the regulation prescribed; and that a mariner could not maintain an action on a promise made in pursuance of such licence to pay wages exceeding in amount double the wages agreed to be given to a person in the like situation on the outward voyage: for that the statute required the magistrate to exercise his own discretion as to the rate of wages to be paid, and to specify the same in the licence (r).

A form of articles of agreement between the master, officers, and mariners of *British* ships employed in carrying slaves from the coast of Africa, is annexed to the statutes made for regulating the manner of carrying slaves in such ships, which contains several regulations applicable to that particular employment, and is the only form allowed to be used for ships in that employment (s).

(g) Page 389.
(i) *Abbott*. 390.

(r) *Rodgers v. Lacy*, 2 *Bos. and Pul.* 57.

These legislative provisions respecting seamen extend to every officer of the ship, except the master. His contract can only be made with the owners, and is not required to be in writing.

The statutes do not render a verbal agreement for wages absolutely void, but impose a penalty on the master if a written agreement is not made. When a written agreement is made, it becomes the only evidence of the contract between the parties; and a mariner cannot recover any thing agreed to be given in reward for his service, which is not specified in the articles. This has been decided (t) with respect to a promise to pay to the mate of a ship employed in the slave trade the average price of a slave at the place of the ship's destination; and also with respect to a promise to pay a sail-maker, serving in a ship belonging to the *East India Company*, a monthly sum beyond the wages mentioned in the ship's articles, which had been signed by him as sail-maker. (u)

A seaman who has engaged to serve on board a ship, is bound to exert himself to the utmost in the service of the ship; and therefore a promise made by the master when the ship was in distress, to pay an extra sum to a mariner, as an inducement to extraordinary exertion on his part, was esteemed to be wholly void (v).

But in the case of *Campion v. Nicholas*, (w) where the cargo of the ship was lost by the capture of a *Swedish* privateer, who carried her into *Gottenburgh*: the master staid there three months to refit the ship, and take in new lading; and to prevent the seamen from going away, he agreed to pay them so much per month whilst they staid there; and in an action for this the master would have discharged himself on the rule that freight is the mother of wages, and that none are ever paid while the ship is lading and unlading; which the Chief Justice agreed to be the general doctrine: but he held it not sufficient to controul a special agreement, as there was in this case, and where too there was so long a stay at *Gottenburgh*.

(t) *White v. Wilson*, 2 Bos. & Pul. 116. 2 Rob. Adm. Rep. 241. Abbott, 391.

(u) *Ellsworth v. Woolmore*, *Guildhall Sitt. December 1803, before Lord Alvanley, Ch. J.* Abbott, 391.

(v) *Harrison v. Watson*, *Peake's Cas. N. P.* 72. (w) 1 Stra. 405. So,

So, a promise by a captain of a ship on behalf of his owners, after the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. (*)

*Of the Seaman's Right to the Whole or Part of his Wages ;
and of the Loss and Forfeiture thereof, &c.*

1. *Where the seaman actually performs his duty, or is prevented from doing it, either by illness, or the misconduct of the master, and the ship earns her freight.*] A seaman, who has faithfully performed his service on board a ship during the whole period of the intended voyage, is entitled to receive the whole of the stipulated reward, if no disaster has rendered his service useless or unproductive to his employer. And as a seaman is exposed to the hazard of losing the reward of his faithful service during a considerable period in certain cases ; so on the other hand the law gives him his whole wages, even when he has been unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage (y). And if a master, in violation of his contract, discharges a seaman from the ship during the voyage, the seaman will be entitled to his full wages up to the prosperous determination of the voyage, deducting, if the case require it, such a sum as he may, in the mean time, have earned in another vessel. *

So, if a master of a ship, by inhuman treatment, compels a sailor to quit a ship, the latter is entitled to his wages for the voyage performed.

Thus, in the case of *Limland v. Stephens* (x), which was also an action of *indebitatus assumpsit* for seamen's wages. The plaintiff and defendant were natives of Sweden. The plaintiff had entered on board the ship at Stockholm. The articles were out and home. She had made a circuitous voyage, and arrived in the Thames in December, 1800. The defendant had assaulted and beat the plaintiff several times in the course of the voyage ; and had put him before the mast, as a common sailor, though he had been hired in the capacity of mate. The plaintiff applied to the Swedish consul, stating his situation, but nothing was done ; the consul only desiring the defendant to attend him, which he refused to do.

(x) *Yates v. Hall*, 1 Term Rep. 73. (y) *Vide Abbott*, 392 * *Ibid.*

(*) 3 Esp. Rep. 269.

The defence relied on was, that the plaintiff being a sailor, had hired himself with the defendant, under certain articles, by which the defendant was bound, under a penalty, to bring back his crew to *Sweden*; so that no action could be maintained in *England*, or until the completion of the voyage.

Lord *Kenyon*, Ch. J. said, "There are reciprocal duties between masters and servants. From the servant is due obedience and respect; from the master, protection and good treatment. Desertion is a forfeiture of wages; but if the captain conducts himself in such a way as puts the sailor into that situation that he cannot, without damage to his personal safety, continue in his service, human nature speaks the language,—a servant is justified in providing for that safety. After the plaintiff had been with the consul, he communicated with the defendant the wish of the consul to see him. The captain said, "he would go when it suited" him; and being pressed by the plaintiff to do so, he beat the plaintiff very severely; threw a log of wood which hurt his foot. The plaintiff left the ship; and the defendant was heard to say, that if he returned he would chain him to the mast, and bring him to *Sweden*."

Erskine, as counsel for the defendant, said, "The plaintiff cannot justify a desertion by reason of the defendant having beat him: for that he could have an action of assault, which is a proper remedy. In this case the plaintiff failed under articles, by which the captain is bound to bring back his crew to *Sweden*, under a penalty; and the sailor forfeits his wages by desertion."

Sed per Lord Kenyon, "Is a man bound to serve at the peril of his life? Desertion is an answer to the seaman's claim for wages; but that must be a voluntary act of the seaman's, and not to be caused by any act of the captain. In this case the act of the captain has made the dissolution of the contract necessary, and, in my opinion, justifiable on the part of the sailor; and I think that he is intitled to a verdict." The jury accordingly found a verdict for the plaintiff.

But, in the case of *Hulle v. Heightman*, (a) it was determined by the Court of *King's Bench* that a seaman having contracted to go a

(a) 2 *East Rep.* 145. 4 *Esp. Rep.* 77. *S. C.*

voyage from A. to B. and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus assumpsit* to recover his wages *pro rata* as far as B.; though he were there wrongfully dismissed by the defendant, (the captain:) but his remedy is either for the breach of the special contract, or for such tortious act of the captain's, whereby he was prevented from earning his wages.

2. *Of stipulated Wages.*] In the case of *Williams v. Brown*, (b) the plaintiff agreed to serve as a seaman during a voyage to and from the *West Indies*: on his arrival there he was claimed as a run-away slave, and delivered up to his master; whereupon it was agreed between the plaintiff, his master, and the captain, that upon payment of a sum of money by the captain to the master, the latter should manumit the plaintiff, he covenanting to serve the captain as a seaman for three years at certain stipulated wages. The plaintiff was accordingly manumitted, and having served the captain upon the homeward voyage, commenced an action against him to recover wages for that voyage upon a *quantum meruit*. The court decided, that he was estopped by his covenant from claiming more than the sum stipulated.

3. *Where the Owners do not send the Ship on her intended Voyage.*] If after the hiring of seamen, the owners do not think fit to send the ship on her intended voyage, the seamen are to be paid for the time during which they may have been employed on board the ship. And if they sustain any special damage by breaking off the contract, it seems reasonable also that they should recover such damage by a special action on the agreement. (c)

4. *Of Outward and Homeward bound Voyages.*] It is observed (d) that the payment of wages is generally dependent on the payment of freight: if the ship has earned its freight, the seamen, who have served on board the ship, have in like manner earned their wages. And as in general, if a ship destined on a voyage out and home has delivered her outward-bound cargo, but perishes in the homeward voyage, the freight for the outward voyage is due, so in the same case (e) the seamen are entitled to receive their wages for the time employed in the outward voyage, and

(b) 3 Bos. and Pul. 67.

(c) Vide Abbott, 401.

(d) Abbott, 398. ad 400.

(e) 1 Lord Raym. 639, 739.

the unloading the cargo. And if a ship fails to several places, wages are payable to the time of the delivery of the last cargo. Upon the same principle, where money had been advanced to the owners in part of the freight outward, and the ship perished before her arrival at the port of delivery, it was held, (f) that the seamen were entitled to wages in proportion to the money advanced. If, as sometimes happens, a charter-party be so framed as to exclude the owners from demanding freight for the carriage of the outward-bound cargo, unless the ship brings back her homeward-bound cargo in safety, it seems that such a special agreement, whereby the owners consent to relinquish a benefit, to which they are entitled by the general principles of law, ought not to affect the seamen, or deprive them of their general right, unless they also by the terms of their contract make the like agreement on their part. Indeed it was once decided in the *Court of Admiralty*, (g) that the seamen, who had navigated a ship chartered by the *East India Company*, and which had delivered her outward-bound cargo in the *East Indies*, but was lost in the homeward voyage, were entitled to recover wages for the outward voyage from the master, although the owners had covenanted with the company not to demand any freight beyond the impress money, of which the seamen had received their share, unless the ship returned home in safety; and although the mariners themselves had given bonds to the master to the same effect with regard to their wages. And Chief Justice *Holt*, is said to have decided a cause tried before him in the same manner. (h) But this decision of the *Court of Admiralty* is reported to have been disapproved of by the *House of Lords*, who in a case (i) arising out of it between the master and the owners, gave liberty to the parties to appeal to the delegates against the decision.

5. *In Cases of Embargo or Hostile Detention.*] Where a seaman is hired by the month, and the ship is detained in a foreign port by an embargo; and he remains with the ship during the period of the embargo; if the ship afterwards performs her voyage, and earns freight, the sailor is entitled to his full wages, including the period of the ship's detention. (k)

(f) 2 *Show.* 283. (g) *Buck v. Rawlinson*, 1 *Bro. P. C.* 137. *oB. ed.* (h) *Edwards v. Child*, 2 *Vern.* 727. (i) *Buck v. Rawlinson*, 1 *Bro. P. C.* 137. *oB. ed.* (k) 3 *Bos. & Pul.* 415. 418. *Abbott*, 393.

So, in the case of a hostile detention by a foreign state, if the ship ultimately performs her voyage, the sailor is entitled to wages during his detention, though he be forcibly taken from the ship by the orders of a foreign prince.

Thus, in the case of *Beale v. Thompson*, (1) where the plaintiff had been hired to serve on board the *Isabella* from the port of London to *Petersburgh*, and from thence back to London, at 5*l.* per month, The circumstances of the detention of this, and several other vessels and their crews were as follow: The ship sailed to *Petersburgh*: and the detention first took place there on the 5th of November, 1800, and in the public orders of the Russian Government it was called an embargo, and was said to be imposed on the ground of a breach of faith on the part of this country respecting the Island of Malta. The masters and crews were soon afterwards forcibly taken from their vessels; such of the seamen as were the subjects of other countries were liberated at the request of their consuls; but the British masters and mariners were marched in parties into the interior of the country, and treated as prisoners of war. A convention hostile to Great Britain was formed between Russia, Sweden, and Denmark; an embargo was imposed in this country on the vessels of those nations; actual hostilities took place; and a British fleet forced the sound, and attacked Copenhagen. Upon the death of Paul, and the succession of the present emperor Alexander, peace was reestablished; and the ships, which had been detained on both sides, were mutually restored. This restitution took place in Russia at the end of May 1801; the British mariners returned with their vessels, which brought home their cargoes, and earned their freight.

The Court of King's Bench,* upon a writ of error from the Court of Common Pleas, decided, that such seizure, however hostile in the manner, so far partook of the nature of an embargo, in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages, even during the time of such detention and imprisonment. But even considering it as a temporary capture, yet like the case of a capture and recapture, the mariner was still entitled to his wages; for a mariner's title to wages depends on the ship's earning her freight for the voyage,

(1) 3 Bur. & Pul. 405.

* 4 East Rep

and the performance of his stipulated duty; and here freight for the voyage was ultimately earned, and the mariner was guilty of no breach of duty; for his stipulation *not to be on shore under any pretence, without leave, before the voyage was ended*, must be understood of being on shore by the party's own unauthorized act. And even if such imprisonment on shore could be considered, yet the master having afterwards received him again on board without objection, amounted to a dispensation of the service in the interval, and entitled him to wages according to his original contract.

6, *In Cases of Capture and Recapture.*] If a ship is captured in the course of her voyage, but is afterwards recaptured, and arrives with her crew at the port of delivery, the seamen are entitled to their wages. (m)

But, if a ship sail to one place in order to take in a cargo there, to be conveyed to another place, and having received the cargo accordingly, be taken before her arrival at the place of delivery, nothing is payable to the seamen for navigating the ship to the first place, because no freight is thereby gained.

Thus, in the case of *Hernaman v. Bawden*, (n) which was an action of *assumpsit* for a sailor's wages on a voyage to *Newfoundland*, for fish, and from thence to *Spain* or *Portugal*. The ship received her cargo at *Newfoundland*, but was taken by the enemy before her arrival at her port of delivery. It was determined that the plaintiff could recover no part of his wages; for as the freighter lost his cargo, so the mariner ought to lose his wages.

So, in the instance of capture and recapture, if the seamen are thereby separated and detained from the ship, which afterwards earns her freight without them, it seems doubtful whether they are entitled to their wages for the period of detention. For though in the case of *Pratt v. Guff*, (o) which was tried before Lord *Kenyon*, wherein the master of a vessel, which had been captured and restored, claimed his wages for the period of deten-

(m) *Bergstrom v. Mills*, 3 *Esp. Rep.* 36. But see *Abbott*, 411, 412. *As to the sailors liability to contribution for salvage.*

(n) 3 *Bur.* 1844. (o) Cited in *Thomson v. Rowcroft*, 4 *East Rep.* 43.

tion, although he had during that time been separated from the vessel, the ship having afterwards earned her freight, the wages for the voyage, exclusive of that period, were paid without dispute; and the defendant is reported to have acquiesced under a verdict given against him for the further sum, by reason of a strong opinion expressed by his lordship at the trial in favor of the claim. Yet in the case of a mariner (*p*) who had engaged for a voyage from *Newcastle* to *London* and back, and was captured with the ship two days after her departure, and taken out of her by the captors and sent to *France*, and who instituted a suit in the *Court of Admiralty* for wages, the ship having been retaken, and performed her voyage. The learned judge of that court said, "Nothing is better settled than that the act of capture defeats all rights and interests," and he held, the interest of the mariner not to be revived in that case, he having been separated from the ship, and the owner having been obliged to hire another mariner at *London* to supply his place on the return.

7. *Where a Seaman is impressed out of a Merchant-Ship, or voluntarily enters into the King's Service.*] Before the passing of either of the Statutes, which regulate the service of seamen in merchant-ships, it was determined, (*q*) that a seaman, who was impressed from such a ship into the king's service, was entitled to receive a proportion of his wages up to the time of impressing, the ship having afterwards arrived in safety at her port of discharge. It has also been since decided, that he is entitled to no more. (*r*) The first of those statutes (*s*) expressly provides, that a seaman belonging to any merchant-ship, who enters into the service of his Majesty on board of any of his Majesty's ships, shall not for such entry forfeit the wages due to him during the term of his service in the merchant-ship, nor shall such entry be deemed a desertion. It has also been decided, that a seaman belonging to a privateer, who was to have a certain share of prizes in lieu of wages, and who had engaged to serve full six months on pain of forfeiting such share, did not lose his share of a prize taken while he was in the privateer by being afterwards impressed, and then

(*p*) *The Friends, Bell, 4 Rob. Ad. Rep. 143. See also Abbott, 411 ad 413.*

(*q*) *Wiggins v. Ingleton, 2 Ld. Raym. 1211. See also Abbott, 394, 5.*

(*r*) *Clements v. Mayborn, K. B. Trin. Term, 24 Geo. III. Abbott, 395.*

(*s*) 2 Geo. II. c. 36. s. 13.

accepting the bounty, and entering on board one of his Majesty's ships before the expiration of the six months. (t)

8. *Of the Death of a Seaman during the Voyage.*] If a seaman falls sick and dies during the voyage, it appears by several foreign ordinances, (v) that his wages shall be apportioned and paid to his representatives. But there is no general decision on this subject in our law books; though in the case of *Cutter v. Powell*, (u), it seems to have been admitted, that the representatives of a seaman hired by the month would be entitled to a proportion of wages to the time of his death. The facts of the case itself were very particular, and the decision turned upon them. Before the passing of the statute which limits the wages to be given to persons for navigating a ship back from the *West Indies* to this country one *Cutter* was hired as second mate on a voyage from *Jamaica* to *Liverpool*; and at *Jamaica*, the master subscribed and delivered to him the following note: "Ten days after the ship *G. P.*, myself master, arrives at *Liverpool*, I promise to pay to Mr. *T. Cutter*, the sum of 30 guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of *Liverpool*. *Kingston, July 31st, 1793.*" The ship sailed from *Kingston* on the 2d of *August*, and arrived at *Liverpool* on the 9th of *October*. *Cutter* went on board the 31st of *July*, sailed in the ship and proceeded, continued, and did his duty as second mate until his death, which happened on the 20th of *September*. It was proved, that the wages usually paid to a second mate on such a voyage, if hired by the month out and home, were 4l per month: that when seamen were shipped by the run from *Jamaica* to *England*, a gross sum was usually given; and that the usual length of a voyage from *Jamaica* to *Liverpool*, was about eight weeks. The plaintiff was executrix of *Cutter*; and it was contended on her behalf, that she ought to recover a proportion of the wages for that part of the voyage that he lived, and served on board the ship. The Court of *King's Bench*, before which this question was brought for decision, directed inquiry to be made as to the usage among merchants, &c. in cases of this kind; but no satisfactory information being obtained as to the usage, although such notes had been often given, the court,

(t) *Paul v. Eden*, *K. B. East Term*, 25 Geo. III. *Abbott*, 395.

(v) *Vide Abbott*, 395.

(u) 6 *Term Rep.* 320. See also *Abbott*, 326.

upon consideration of the particular terms of the note, and of the great excess of the sum to be paid to *Cutter*, if he had performed the whole voyage according to those terms, above the usual rate of wages upon a monthly hiring, decided that nothing was payable for the partial service: declaring at the same time, that if the plaintiff could have proved a usage to pay a proportional sum in similar cases, their decision should have been conformable to the usage.

Where the captain of a ship has accounted upon oath to the collector of the port for a sum of money, as the wages due to a deceased seaman, and paid the same to *Greenwich Hospital*, under the 37 Geo. III. c. 73. the representatives of such seamen may still sue the captain for any wages due beyond the sum so paid,

Thus in the case of *Armstrong, administratrix of Armstrong, v. Smith*, (w) which was an action brought by the plaintiff as administratrix of her husband, who had been a mate of a *West Indiaman*, and had died on the voyage home, for wages due to him from the defendant as captain of the ship upon that voyage,

Upon the trial of this cause before Sir *James Mansfield*, Ch. J. it was proved, by acknowledgments of the defendant made to the plaintiff immediately after his arrival from the voyage, in which the plaintiff's husband died, that 23*l.* were due to him for wages; and the only defence relied on was, that the defendant had within three months, after the arrival of the ship, paid into the office of the receiver of the six-penny duty for *Greenwich Hospital*, under the 37 Geo. III. c. 73. s. 7. the sum of 9*l.* as the arrear of wages due to the deceased, and for the use of his executor or administrator. This, it was contended, deprived the plaintiff of her right of action for the wages due to her husband, the defendant having, according to the directions of the above statute, accounted with *Greenwich Hospital*, upon oath, for the amount of the wages due to the plaintiff, and having made himself liable to heavy penalties if he had rendered a false account. His lordship directed the jury to deduct the 9*l.* paid into *Greenwich Hospital* to the account of the plaintiff, and to give her a verdict for 14*l.* This was accordingly done, and liberty was reserved to the defendant to move the court to set that verdict aside, and enter a nonsuit.

A rule was accordingly moved for and obtained : But the court, after argument, determined that the plaintiff was entitled to recover the 14^l.

Sir *James Mansfield*, Ch. J. said : " The single question in this case is, whether the 37 Geo. III. c. 73 has taken away from the representatives of seamen dying upon a voyage the right of recovering from the captain such wages as remain due to them in their representative character, after allowing to the captain for so much as he has duly paid upon their account to the officer of *Greenwich Hospital* ? Nothing is to be collected from the language of the act as to the particular grievance which induced the passing those provisions which apply to this case. On that point we are left in the dark. Representatives of deceased seamen must often not only be very ignorant respecting the amount of wages due to them from captains, but have must encountered great difficulties in pursuing their remedies against captains who had probably embarked on fresh voyages. To remedy this inconvenience it is provided by the act, that every master of a ship employed in the *West India* trade shall, within 10 days after his arrival out and home, deliver in an account, on oath, of all seamen who have died on the voyage, and within three months after his arrival in any port of *Great Britain* pay to the receiver of the six-penny duty for *Greenwich Hospital* any wages due to any seaman who has died during the voyage, to the use of the representatives of such seamen. It is observable, that in case the master neglects to comply with the directions of the act in the above mentioned respects, he is subjected to two penalties of 50*l*. each, and also to double the amount of the wages due to the deceased seaman ; but that the penalties, when recovered, are distributed in the proportions of one-third to *Greenwich Hospital*, one-third to the support of the seamen's hospital, if any there be ; and if not, to the disabled seamen of that port and their families, and the remaining one-third to the informer. Of these penalties therefore nothing is reserved for the representatives of the deceased seaman, who have been the actual losers by this neglect or fraud of the master of the ship. That is a strong ground for inferring, that it was not the intention of the legislature to deprive them of their remedy at law for the wages not actually paid to the officer at *Greenwich Hospital*. For it seems probable that the legislature would have given some part of the penalties recovered to the representatives

of the deceased seaman by way of compensation for their loss, if it had intended to deprive them of their right of action for the wages not duly paid in on their account. If the whole of the wages due are faithfully paid in, of course the representative of the seaman has no longer any right of action for wages; but if a part only be paid in, and the remainder be fraudulently withheld, on what principle is it that the representatives of the seamen are to be deemed to be deprived of their right of suing for such wages? According to the construction contended for on behalf of the defendant, the master of a ship may be called upon to pay large penalties, no part of which, nor of the wages remaining unpaid will ever belong to the person really injured by the misconduct of the captain, viz. the representative of the seaman. It appears to me monstrous to put such a construction upon an act, which does not contain one single word by which the right of the representative to recover wages not duly accounted for to *Greenwich Hospital* is taken away."

9. *Where a Ship does not perform her Voyage in consequence of her not being Sea-worthy, &c.*] The wages of seamen, whether hired by the month or for the voyage, are sometimes lost without any fault on their part, and sometimes forfeited by their misconduct. The payment of their wages depends on the successful termination of the voyage: therefore if by any disaster happening in the course of the voyage, such as the loss or capture of the ship, the owners lose their freight, the seamen also lose their wages. (*)

So, if a ship be not sea-worthy at the commencement of her voyage, and in the course of it is forced into port, and the crew are compelled to abandon the voyage; the sailors cannot recover wages for any part of the voyage: but their remedy is by special action on the case against the owners.

Thus, in the case of *Eaken v. Thom*, (y) which was an action of *assumpsit* for seaman's wages. The defendant was the owner of a ship living at *Liverpool*; and had hired the plaintiff to proceed as mate on board the ship, on a voyage to *Philadelphia*. The ship sailed on the voyage, but was under the necessity of putting into *Cork*, not from any uncommon badness of the weather, but

(*) Vide *Molloy*, Book 2. ch. 3. f. 10. 1 *Sid.* 179. *Abernethy v. Landale*, *Doug.* 539. *Abbott*, 411. (y) 5 *Esp. Rep.* 6,

from the circumstance of the want of sea-worthiness in the ship; which, on inspection, was found not to be capable of repairs; so that she was condemned and sold, and the voyage abandoned.

The counsel for the plaintiff admitted that, in common cases, freight was the mother of wages, and that if the ship was lost the sailor had no claim: but he contended, that that was the case where the ship was sea-worthy, when she failed on her voyage, and, unless prevented by the common casualties of the sea, could have completed her voyage, and the seaman earned his wages. The owner, by sending out a ship incapable of performing the voyage, could not defeat the plaintiff's claim to wages where he had been willing to serve, and where the voyage was lost and defeated by reason of the defendant's own default, and not through any fault of the plaintiff.

Lord *Ellenborough*, Ch. J. said: "That the cases had never made the distinction contended for by the counsel. The rule of law was general; the ship must perform her voyage to entitle the seamen to recover; and if the owner sent her out under such circumstances as were stated, it should be the object of a special action on the case: but he was of opinion, that the sailor could not, on the ground stated, recover his wages."

The plaintiff afterwards proved, that when the vessel was found not to be in a capacity to proceed on the voyage, he was ordered to remain on board until she underwent some repair; which he did, and for which he claimed wages.

Lord *Ellenborough* ruled, that this being a new contract, the plaintiff was entitled to recover on that account, as for work and labour.

10. *In Cases of Embezzlement or Damage of Part of the Cargo.*] If any part of the cargo be embezzled or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, it is observed, (2) that they may, by the custom of merchants, deduct the value thereof from the wages of the seamen, by whose misconduct the injury has taken place. And that the last proviso

(2) *Abbott*, 418.

the ship has introduced into the usual agreement signed by the seamen, is calculated to enforce this rule in the case of embezzlement either of the cargo or of the ship's stores,

But where part of the cargo is plundered during the voyage, but by whom cannot be ascertained, a sailor does not, in consequence of such plunderage, forfeit his wages; nor, as it should seem, is he liable to any deduction therefrom.

Thus, in the case of *Thompson v. Collins*, (a) which was an action of *assumpsit* for seaman's wages. On the trial, a verdict was found for the plaintiff, subject to the opinion of the Court of *Common Pleas* on a case which stated, that on the 19th of *February*, 1803, the plaintiff shipped himself as a sailor on board the ship *Mentor*, at *Port Maria*, in *Jamaica*, for a voyage from *Jamaica* to *London*, and afterwards served on board the ship during the voyage. At the time of his entry he signed the articles prescribed by the statute 37 Geo. III. c. 73. The *Mentor* had several pipes of *Madeira* on board, which were shipped at *Madeira* on the outward-bound voyage, and stowed in the fore-part of the ship, and secured in the usual manner by a strong partition of deal boards to prevent the crew from getting to them. When the ship set sail from *Jamaica* on her homeward-bound voyage the partition was secure. In the course of her passage from *Jamaica* to *London* the partition was broken down by some of the crew, but by whom the same was done could not be ascertained. Six of the casks were plugged by some of the crew, but it was not proved that the plaintiff was concerned in the transaction. Upon the landing of the casks plugged there was found a deficiency in their contents to the amount of 162 gallons. The defendant, the owner, paid all the other men their wages, deducting their proportionable value of the *Madeira* lost.

The question for the opinion of the court was, whether the plaintiff was entitled to recover?

The counsel for the defendant argued thus: "The form of agreement, to be entered between the master and mariners upon *West India* voyages is expressly provided by 37 Geo. III. c. 73. s. 11. Whatever conditions, therefore, are to be found in the articles contained in the schedule of that act must be binding upon

(a) 1 *New Rep. C. B.* 347.

the parties. At the conclusion of the articles it is agreed 'that each seaman and mariner who shall well and truly perform the above mentioned voyage (provided always, that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores) shall be entitled to their wages or hire that may become due to him pursuant to this agreement.' The right to wages, therefore, is subject to a condition; and if there be any plunderage or embezzlement, the right to wages is forfeited. The terms of the proviso, being clear and precise, cannot be done away by construction. Many of the marine laws appear at first repugnant to justice; but they are founded on policy, and have therefore been supported. It appears from *Molloy*, book 2. chap. 3. s. 9. that if goods are embezzled, the master may deduct the amount out of the mariner's wages; for before the mariner can claim his wages out of what the ship hath earned, the ship must be acquitted from the damage that the merchants have sustained by the negligence or fault of the mariners. It is also said in *Bellamy v. Ruffel*, 2 *Show.* 167. that there is a custom between the master and hired seamen to deduct out of their wages what goods are damaged."

The court, however, were of opinion that the plaintiff was entitled to recover.

Sir *James Mansfield*, Ch. J. said: "Whether the defendant in this case be entitled to deduct out of the plaintiff's wages his proportion of the embezzlement, in the same manner as has been done respecting the other seamen, might perhaps afford some question; but nothing has been tendered, and no money paid into court, and we have only to determine whether the plaintiff be entitled to recover. If, however, the right to a deduction be considered as a question of importance, and the defendant will pay into court the rest of the plaintiff's wages, together with the costs of this action, I should have no objection to let this case stand over to next term, in order to consider further the question of deduction; but in that case the defendant must pay the costs of the argument. As to the act of Parliament, nothing can be more unreasonable than the construction set up for the defendant; the words relied upon are 'that each seaman and mariner who shall well and truly perform the above-mentioned voyage (provided always, that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores) shall be entitled to their wages or hire that may become

come due to him pursuant to this agreement.' From these general loose words the defendant would contend, that if any goods to the amount of 5s. be plundered or embezzled by A., or any unlawful act committed by A., B., and every other sailor on board, shall lose his whole wages. The words, therefore, must be construed respectively to every sailor who shall plunder, embezzle, or commit an unlawful act. There is no foundation, therefore, for a forfeiture of the whole wages; and I suspect that there is as little for a proportionable deduction; for, notwithstanding what is said in *Molloy*, if such be the rule of law, it is scarcely possible but that it must have been often mentioned in our books, and as well known as any rule of maritime law, since frequent occasions must have arisen for the application of it."

II. *Of Desertion.*] Desertion from the ship is held to be a forfeiture of the wages previously earned in all maritime states (b); and in conformity to this principle of maritime law, the legislature of this country, by the stat. 11 and 12 W. III. c. 7. s. 17. "for the prevention of seamen deserting of merchant ships abroad in parts beyond the seas," has enacted, "That all such seamen, officers, or sailors, who shall desert the ships or vessels wherein they are hired to serve for that voyage, shall, for such offence, forfeit all such wages as shall be then due to him or them." And by the stat. 2 Geo. II. c. 36. s. 3., if a seaman shall desert, or refuse to proceed on the voyage on board any ship bound to parts beyond the seas, or shall desert from the ship to which he belongs, in parts beyond the seas, after he shall have signed the contract, he shall forfeit to the owners the wages due to him at the time of his deserting, or refusing to proceed on the voyage.

By the articles of agreement usually signed in these cases, it is stipulated that the mariner shall not go out of the ship, on board any other vessel, or be on shore under any pretence whatever, without leave; and that in default he shall be liable to the penalties of this act of parliament: but it is observed (c) that this stipulation is merely referrible to the statute, and does not create a forfeiture of wages in a case where the statute has not inflicted it; as in the case of leaving the ship after her arrival in a port of this country, although before she is moored. This case is specifically provided

(b) Vide *Abbott*, 413.

(c) *Ibid.* 414.

for by the second section of the last mentioned act, which, after reciting that "seamen and mariners, after their ship's arrival at their unlivering port in *Great Britain*, oftentimes leave the ships and vessels before they are unladen, or before the said seamen and mariners are discharged by the masters or commanders of such ships or vessels," enacts, "That in case of any seaman or mariner, not entering into the service of his *Majesty*, his heirs and successors, shall leave such ship or vessel to which he or they belong, before he or they shall have a discharge in writing from the master or commander, or other person having the charge of such ship or vessel, he or they so leaving such ship, or vessel, shall forfeit one month's pay to the use of *Greenwich* hospital."

Although by this clause the discharge is required to be in writing, yet in an action brought by a seaman against the master for his wages, at the trial whereof it appeared that the plaintiff and several others left the ship under these circumstances, while she was under the command of the mate, and the master insisted upon his right to make this deduction, but did not call the mate to prove that he had not given a discharge in writing, it was held, that the jury might presume that the plaintiff had received such a discharge; this being the case of a penalty in which the negative ought to be proved by the party insisting on the forfeiture, as the circumstances of the case appeared to afford him the means of doing so (*d*).

The statute 2 Geo. II. c. 36. s. 9. also authorizes the master or owner to deduct from the wages due to a mariner all the penalties and forfeitures incurred by the act, and to enter them in a book to be kept for that purpose, to be signed by the master and two or more principal officers. Upon this clause of the act it has been held, (*e*) that the master cannot make this deduction unless the forfeiture has been regularly entered in a book, as the statute directs:

With respect to ships of the burthen of one hundred tons and upwards, employed in the *coasting trade*, and going to open sea, it is provided (*f*) that if a seaman, having signed the requisite agreement, neglects or refuses to proceed on the intended voyage, he

(*d*) *Frontine v. Frost*, 3 Bos. & Pul. 302.

(*e*) *Ibid.*

(*f*) 31 Geo. III. c. 39. s. 3. & 4. See also *Abbott*, 416.

forfeits to the owner *all* the wages due to him at the time; but the forfeiture for desertion afterwards, and before the voyage or voyages agreed upon, or upon which such ship shall have proceeded, shall be completed, and the cargo of such ship delivered, or before the seamen shall have a discharge in writing from the master, &c. is only of *one month's* wages to the use of *Greenwich* hospital.

In *all* cases a seaman who wilfully absents himself from the ship without leave, forfeits to the use of *Greenwich* hospital *two days'* pay for each day's absence (g).

In the *coasting trade*, the statute 31 Geo. 3. c. 39. f. 9. directs, that if a seaman is hired by the voyage, and the period of the voyage agreed upon exceeds one *lunar* month, the forfeiture of one month's pay shall be accounted a forfeiture of a sum of money bearing the same proportion to the whole wages as a lunar month shall bear to the whole period of the voyage; and that the forfeiture of two days' pay shall be computed in the same manner. If the whole period of the voyage does not exceed one lunar month, the forfeiture of one month's pay is to be accounted a forfeiture of the whole wages contracted for: and the like as to the forfeiture of two days' pay, if the voyage does not exceed two days.

In addition to this forfeiture of wages earned by service in the ship from which a seaman deserts, the legislature, by stat. 37 Geo. III. c. 73. f. 1. has further punished desertion from a *British* ship in the *West Indies* with forfeiture of *all* the wages to which he might otherwise be entitled for the voyage made in the ship *on board of which he shall enter immediately after such desertion*.

We have already seen (h) that entry into the service of his Majesty is not deemed a desertion, nor followed by the forfeiture of wages.

The legislature has also punished with the forfeiture of wages the offence of neglecting or refusing to assist the master in defending the ship against the attack of pirates (i). It seems also that

(g) 2 Geo. II. c. 36 f. 5. & 31 Geo. 3. c. 39. f. 4.

(h) *Vide ante*, page 376.

(i) 22 and 23 Car. 2. c. 11. f. 7.

neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during the voyage, will also deprive the seaman of his wages (k).

But in the case of *Sigard v. Roberts*, (l) which was an action of *assumpsit* for seaman's wages against the defendant, as captain of the ship *Elizabeth*, on a voyage from *Hamburg* to *Tranquebar*, from *Tranquebar* to any port the captain should think proper; and from thence to the port of *Hamburg*, or any other port of delivery.

The plaintiff signed articles, and sailed on the voyage to the *Iles of France*, where she took in a cargo of coffee, sugars, &c. for *Hamburg*, and was proceeding on her voyage, when she was met, on the 29th of *March*, 1799, in the *North Star*, by his Majesty's ship the *Lord Duncan*, and taken and brought into the *Downs*, and libelled in the Court of *Admiralty* as enemy's property.

It was given in evidence for the plaintiff, that he had come on shore with a boat from the ship, accompanied by the second mate and the surgeon; that he had remained on shore: but it appeared that he and the other seamen, on being required to get on board, said they had no victuals the whole of the day, and only requested to stay till they had some; and that, being then left on shore, they had gone to the ship the next morning, when the defendant refused to receive them, and dismissed them, refusing to pay them their wages, and desiring them to go to *Hamburg* and seek them.

The counsel for the defendant rested their defence, 1st. on the clause in the articles by which the crew were to serve on the voyage, above stated, and back to *Hamburg*, or wherever else the port of delivery should be; that the ship not having arrived at *Hamburg*, or at any other port of delivery, the action was not maintainable until either of those events took place. 2dly, That by the seventh clause in the articles, no seaman was to demand any money of the captain, but to be content with the wages he had received in advance, until the voyage was ended, the cargo unloaded, and the ship cleared and brought into the proper moorings, under penalty of six marks; so that this was a bar to the

(k) 2 *Rob. Adm. Rep.* 261. *Abbott*, 418.

(l) 3 *Esp. Rep.* 71.

plaintiff's recovery in this country. 3dly, That this was a desertion, by which the seaman forfeited his wages, under the last clause in these articles.

Lord *Eldon*, Ch. J. said, "By the last clause in these articles, desertion is a forfeiture of wages; the law would have held the same language: the principal question, therefore, here is, Is this a desertion? The defendant undertakes to prove that it is; but, from the circumstances of the case, I am of opinion that it is not: the plaintiff and the other seamen only requested to be permitted to remain on shore to have some victuals; it was a reasonable request; they had no intention of abandoning the ship: they, in fact, went on board as soon as they had the means, and were refused to be received. After thus offering to return to their duty, the captain shall not be permitted to call such conduct a desertion, when the whole conduct of the plaintiff showed that no such was intended."

"The second question set up by the defendant is, that the wages, if any are due, are recoverable at *Hamburg* only; and it is therefore contended that the captain cannot be sued in a foreign court of justice. It is a very wholesome provision, and it may be right law, that if a ship is captured, and the master and sailors all dismissed by the force of third persons, such clause should be effectual; but the question is, has the plaintiff a right to sue *here*? In this case the captain discharges the sailor. I should be sorry to state, that when the captain discharges the seaman, such seaman has not a right to sue for his wages. The seventh clause does not contain an express prohibition to sue in any country, when the voyage is ended: this clause therefore cannot prevent the sailors suing for their wages, when the master discharges them; the voyage then is ended as to the man who is discharged from the ship."

Of the Time and Place of Payment of Wages.

By the articles of agreement annexed to the statute 37 Geo. 3. c. 73. made for preventing the desertion of seamen from ships trading to the *West Indies*, and which are in common use for other voyages also, it is stipulated, that the seamen shall not demand,

or be entitled to any part of their wages until the arrival of the ship at the intended port of discharge, and delivery of her cargo, nor in less than *twenty days*, if they are not employed in such delivery. The port of discharge here mentioned seems, by the form of the articles, to be the *foreign port to which the outward bound cargo is destined*; but Mr. Abbott, in his treatise on this subject (m), conceives it to be meant of the *port of discharge and delivery at the ship's return to this country*; for, he observes, unless the voyage and stipulated service of the seamen terminate at the foreign port, only *half* the wages then due can be paid there; the legislature having enacted as a general law (n), "that no master or owner of any merchant ship, or vessel, shall pay or advance, or cause to be paid or advanced, to any seaman or mariner, during the time he shall be in parts beyond the seas, any money or effects, upon account of wages, exceeding *one moiety* of the wages which shall be due at the time of such payment, until such ship or vessel shall return to *Great Britain, or Ireland, or the Plantations, or to some other of his Majesty's dominions, whereto they belong, and from whence they were first fitted out*; and if any such master or owner of such merchant ship, or vessel, shall pay or advance, or cause to be paid or advanced, any wages, to any seaman or mariner, above the said moiety, such master or owner shall forfeit and pay *double* the money he shall so pay or advance, to be recovered in the *High Court of Admiralty*, by any person who shall first discover and inform of the same."

And by the articles of agreement prescribed by the statute 39 Geo. III. c. 80. made to regulate the manner of carrying slaves in *British* ships from the coast of *Africa*, the master engages "to pay one month's pay after the landing of the slaves in the *West Indies, or America*, ten days before the sailing of the ship on her homeward-bound passage." And the officers and mariners engage "not to demand their wages, or any part thereof, except the value of the *fourth* part of their wages, to be supplied in slops or other necessaries, and one month's pay with their short allowance money then due in the *West Indies, or America*, until the ship's arrival at her delivering port, * except they shall be im-

(m) p. 405. (n) 8 Geo. I. c. 24. s. 7. made perpetual by 2 Geo. 2. c. 28. s. 7. See also 12 Geo. II. c. 30. s. 12.

* This appears, by the articles, to be a delivering port in Europe, Vide Abbott, 406. note (l).

pressed, or enter on board any of his Majesty's ships, or be discharged by mutual consent, agreeable to the certificate specified in the act." (o) -

By the articles of agreement for service in a *Dutch* ship, which were proved in evidence in the case of *Gienar v. Meyer* (p), it was stipulated, that in case one or more complete voyages should be made out of the country, the master should, at every *second* place of delivery, secure to the seamen *two thirds* of their wages, by an order on his purser or correspondent at *Rotterdam*; but that none of the seamen should institute any suit against the master in foreign countries.

By the articles of agreement made at *Altona*, for service in a *Danish* ship, which were proved in the like manner at another trial (q), it was stipulated that no one should demand any money, while abroad, from the master; but every one should content himself with the money received upon hand, until the completion of the voyage, to the satisfaction of the master and his owners, and until such time as the ship should have arrived at *Altona*; and it should at all times be at the option of the master to give them money while abroad or not.

By the law of *America* a seaman is entitled to receive one third of his wages due to him at every port where the ship unloads and delivers her cargo, before the voyage is ended, unless the contrary is expressly stipulated in the contract (r).

As to ships engaged in *foreign voyages*, it is enacted by the stat. 2 Geo. II. c. 36. s. 7. that, upon the arrival of any ship in *Great Britain*, from parts beyond the seas, the master or commander shall be obliged to pay the seamen thereunto belonging their wages, if demanded, in *thirty days* after the ship's entry at the custom-house, except in case where a covenant shall be entered into to the contrary, or at the time the seamen shall be discharged, which shall first happen, if demanded, deducting the penalties and forfeitures

(o) *Abbott*, 405. 6. (p) 2 H. Bl. 63. In consequence of the concluding clause of these articles, it was held that an action for wages could not be maintained, although the vessel had been seized by an *English* ship, brought into this country, and sold here, under the authority of the Government, the master and crew not being made prisoners.

(q) *Hull v. Heitman*, at *Guildhall Sitt.* after Mich. Term, 1801. *Abbott*, 408. (r) *Ibid.*

imposed by the act, "under penalty of paying to each seaman, or mariner, that shall be unpaid, contrary to the intent and meaning of this act, *twenty shillings* over and above the wages that shall be due to each person, to be recovered by the same means and methods as the wages may be recovered; and such payment of wages aforesaid shall be good and valid in law, notwithstanding any action, bill of sale, attachment or incumbrance whatsoever."

And as to ships employed in the *coasting trade*, in the manner before mentioned, it is enacted, by the stat. 31 Geo. III. c. 39. s. 5., "that the master, commander, or person having charge of the ship, shall be obliged to pay the seamen their wages, if demanded, within *five days* after the ship shall be entered at the custom-house, or the cargo be delivered, or at the time the seamen shall be discharged, which shall first happen, unless an agreement shall have been made to the contrary, in which case the wages shall be paid according to such agreement, deducting in every case the penalties imposed by this act, under the like forfeiture of *twenty shillings*, to be recovered in the same manner as with regard to ships coming from abroad; and such payment shall be good in law, notwithstanding any action, bill of sale, attachment, or incumbrance whatsoever."

As to ships employed in the *slave trade*; it is enacted, by the stat. 39 Geo. III. c. 80. s. 34. that upon the arrival of every ship at her discharging port in *Great Britain*, the officers and seamen therein shall be continued in *full* pay and provisions, until the ship is cleared inwards, or their accounts are settled and paid. But no time of payment being mentioned in the body of this statute, or in the articles annexed to it, Mr. *Abbott* (s) conceives the general rule before mentioned, with respect to ships coming from abroad, applies to ships engaged in this trade also.

Of the Remedy for the Recovery of Wages.

Seamen, in ordinary cases, have a threefold remedy for the recovery of their wages, viz. against the ship, the owners, and

(s) Page 40.
Cic 4

the

the master; (t) the master whether appointed to that office at the commencement, or succeeding to it in the course, of the voyage, can only sue the owners personally in a Court of *Common Law*. But as he generally receives the freight and earnings of the ship, and may pay himself out of the money in his hands, he has not often occasion for the aid of a Court of Justice to obtain his right. (v) He has not, however, any lien on the ship for wages, or money paid for stores or repairs done in *England*. (u)

The suit of the seamen in the Court of *Admiralty* is said (w) to be frequently spoken of as an excepted case, and an indulgence granted to them on account of the convenience and advantage of proceeding in a court, in which all may join in one suit, and payment may be obtained out of the value of the ship; and of the presumption that they, who contract with the master, contract with him on the credit of the ship: whereas the master, who contracts with the owners, is presumed to trust to their *personal* credit.

In pursuance of this distinction between the remedies of the seamen and the master, it is now settled, (x) that if the hiring be on the usual terms, and made by word, or by writing only without seal, the seamen, or any one or more of them, and every officer, except the master, may sue in the Court of *Admiralty*; and may, by the process of that court, arrest the ship as a security for their demand, or cite the master or owners *personally* to answer to them. And the seamen may sue there not only for the wages earned in the course of the voyage, but for those earned in rigging and fitting out a ship for a voyage on which they have engaged to proceed, if the owners do not afterwards think proper to send the ship on the intended voyage. (y) And it seems also that they may sue there for the wages contracted to be paid to them for navigating a ship from one port of this country to another. (z)

In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it; the seamen's claim for his wages is preferred before all other charges, for the same

(t) *Abbott*, 421. (v) *Ibid.* (u) *Wilkins v. Carmichael*, *Doug.* 101.

(w) *Ibid.* (x) Vide *Abbott*, 421, 422.

(y) *Ibid.* 422. (z) *Ibid.*

reason that the last bottomry-bond is preferred to those of an earlier date: the labour of the seamen, having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have had. (a)

In the Courts of *Common Law* the seamen may sue either the master, as the person immediately contracting with them, and answerable to them, or the owners, as the persons virtually contracting with them through the agency of the master, and answerable for the performance of his engagement. And in suits in the courts of *common law* the form of action depends upon the nature of the contract: if the contract be under seal, an action of *debt* or *covenant* must be brought; if it be not under seal, an action of *debt* or of *assumpsit*. If, however, ship's articles are put under seal, but by the articles they are expressed to be under hand only, and it appear clearly not to have been the intention of the parties to enter into a sealed instrument, an action of *assumpsit* for wages will lie. (b)

The contract, whatever be its form or nature, always remains in the possession of the master or owners; and the statutes (c) expressly ordain, that where it becomes necessary to produce the contract in court, no obligation shall lie on the seamen to produce it, but on the master or owners of the ship, and that no seamen shall fail in any suit or process for the recovery of wages for want of the production of it.

In the *fishing trade*, particularly in the *whale fishery*, the seamen usually serve under an engagement to receive a certain proportion of the profits of the adventure. Such an engagement is said (d) to be rather in the nature of a partnership than of a contract of hiring and service; in which case the ordinary remedy for their respective shares could only be by bill in *Chancery*; it being a general rule, that one partner cannot maintain an action at law against his co-partner for a moiety of their joint-stock and profits in trade.

But in the case of *Wilkinson v. Frazer*, (e) it was ruled by Lord *Alvanley*, Ch. J. at *nisi prius*, that if a sailor engages on a

(a) Vide *Abbott*, 430. (b) *Clement v. Gunhouse*, 5 *Esp. Rep.* 83.
(c) 2 *Geo. II. c.* 36. *f.* 8 31 *Geo. III. c.* 39. *f.* 6. (d) *Abbott*, 382.
(e) 4 *Esp. Rep.* 182.

whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, he may, after the sale of the cargo, maintain an action for his wages against the captain, and shall not be considered as a partner. And his lordship observed, "That the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place: and that he should not therefore consider them as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage."

For more concerning owners and masters of ships vide
post, part III. tit. "Bailment of Goods," &c.

CHAPTER VIII.

Of Contracts and Agreements with Parish Officers.

CHURCHWARDENS *de facto*, may maintain an action against former churchwardens, for money received by them for the use of the parish, though the validity of the election of the plaintiffs to the office be doubtful, and though they be not the immediate successors of the defendant.

Thus, in the case of *Turner* and another v. *Baynes*, (a) which was an action of *assumpsit* by the churchwardens of the parish of *Stow Market* in *Suffolk*, against a former churchwarden. The usage of the parish had been for the vicar to choose one churchwarden, and the parishioners the other. But disputes having arisen, both the plaintiffs were chosen by the parishioners at *Easter*, 1794, and continued in office till *Easter*, 1795; during which time, viz. in *Hilary Term*, 1795, the action was brought against the defendant, who had been churchwarden from *Easter* 1790 to *Easter* 1791, and who had admitted a sum of money to be in his hands, on the balance of his accounts at *Easter*, 1791, when he went out of office.

The first count of the declaration was, for money had and received to the use of the plaintiffs as churchwardens, and the promise to them as churchwardens. The second, for money had and received to the use of the inhabitants of the said parish of *Stow Market*, and the promise to the plaintiffs as churchwardens. The third, on an account stated with the plaintiffs as churchwardens, of money owing from the defendant to them as churchwardens, and the promise accordingly. The fourth on an account stated with the plaintiffs as churchwardens, of money owing from the de-

(a) 2 *H. Blac.* 559. *Vide* *Bishop v. Eagle*, 10 *Mod.* 22. and *Bac. Abr.* tit. Churchwardens, E.

pendant

fendant to the inhabitants of the said parish, and the promise to the plaintiffs as churchwardens, and the breach was laid to the damage of the inhabitants of the said parish.

At the trial, before Mr. Justice *Ashburst* at the *Suffolk* assizes, the plaintiffs were nonsuited, chiefly on two grounds: 1st, That they were not duly appointed churchwardens; and 2dly, That they were not the immediate successors of the defendant in the office.

But upon a motion for a new trial the Court of *Common Pleas* said: "They were very clearly of opinion that the action was maintainable by the plaintiffs, on both the grounds taken in the argument; that being admitted, and sworn into the office, and acting as churchwardens, the defendant who was a wrongdoer, in withholding the money, should not be permitted to deny their right to bring the action; and that churchwardens being a corporation for the purpose of taking care of the goods of the church, the right to sue for money withholden from the parish passed from one set to the other, it being perfectly immaterial, whether the immediate or any other successors of the defendant brought an action which was not founded in privity between them."

Churchwardens when chosen are a corporation; and, as such, they are said (*b*) to be morally competent to assent to a reasonable contract or agreement beneficial for the parish; and thereby to bind the parishioners and their successors, and also succeeding churchwardens.

Thus, (*c*) an agreement made by the churchwardens of a parish, that the five o'clock bell in the morning should not be rung; in consideration whereof the parties, inconvenienced thereby, covenanted with the churchwardens to erect a new cupola clock and bell; the Court of *Chancery* decreed a specific performance of the agreement by an injunction, not to ring the bell during the lives of the parties who had erected the cupola, &c. pursuant to the agreement.

(*b*) *Powell on Contracts*, 114.

(*c*) *Dr. Martin v. Nutkin*, 2 *P. Wms.* 266.

2. Of Contracts with Overseers of the Poor respecting the Maintenance, &c. of Paupers.

An action (d) was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him by the defendant Turner, who was the only acting overseer of the parish. The pauper was suddenly taken ill, and her son called in the plaintiff who had attended her for four months, and cured her. After the cure Turner was applied to, and promised to pay the plaintiff's bill. It was held, that though there was no precedent request from the overseers, yet the promise was good, notwithstanding the statute of frauds; for overseers are under a moral obligation to provide for the poor. 2dly, That as Turner was the only acting overseer, the other was bound by his promise.

But the law will not raise an *implied* promise by the overseers, &c. of a parish where a pauper is settled, to reimburse the money laid out by another parish in which he happened to be in, for providing him with necessary medical assistance, &c.

Thus, in the case of *Atkins* and others v. *Banwell* and another, (e) which was an action of *indebitatus assumpsit*, brought by the plaintiffs as the parish officers of *Toddington* in the county of *Bedford*, against the defendants, as the parish officers of *Milton Bryant* in the said county, to recover 14*l.* 12*s.* for money paid, laid out, and expended by the plaintiffs for meat, drink, board, lodging, medicines, medical assistance, and other necessaries, found and provided by them for one *John Mitchell*, his wife and family. At the trial a verdict was found for the plaintiffs, subject to the opinion of the court on the following case :

“ The plaintiffs are the parish officers of *Toddington*, and the defendants are the parish officers of *Milton Bryant*. *John Mitchell* was a pauper legally settled at the time of his illness and death hereafter mentioned, in *Milton Bryant*, but resided with his wife

(d) *Watson v. Turner and another*, *Scacc. Trin. 7 Geo. III. Bul. N. P.* 129.

(e) 2 *East Rep.* 505.

and family at *Toddington*, and was there suddenly attacked with dangerous illness, which prevented his being moved from the place of his residence to that of his settlement without endangering his life. The plaintiffs gave notice to the defendants of the illness of their pauper within two or three days after the pauper was so taken ill. The pauper's illness continuing, he afterwards, and about three weeks from such notice, died of such illness in the parish of *Toddington*; and the plaintiffs, as parish officers of that parish, from the time of such notice up to the pauper's death, laid out 14*l.* 12*s.* as well for necessaries for the pauper and his family, as for medicines and medical assistance for the pauper, and also on the funeral of the pauper after his death. The present action was brought to recover that sum. The jury found that there was no express promise of the defendants to pay it to the plaintiffs. The question for the opinion of the court was, whether such action be maintainable in law? If the court should be of that opinion, then the verdict for the plaintiffs was to stand; if not, a nonsuit to be entered."

The court were of opinion, that this action was not maintainable: And Lord *Ellenborough*, Ch. J. said, "A moral obligation is a good consideration for an *express* promise, as was held in the case of *Watson v. Turner*; (*f*) but it has never been carried further, so as to raise an implied promise in law. There is no precedent, principle, or colour for maintaining this action."

Parish officers are bound to take care of casual poor; and if a person, not a parish officer, takes care of a person coming within that description, and for whom the parish officers would be liable to provide, he has a right to recover against them the expences incurred on such an occasion.

Thus, in the case of *Simmons v. Wilmott* and others, (*g*) which was an action of *assumpsit* against the defendants as churchwardens and overseers of the poor of the parish of *Isleworth*, for meat, drink, lodging, medicine, attendances, &c. found and given for one *Thomas Shaw*. The case in evidence was that *Shaw*, who was carter to a Mr. *Willan*, residing at *Mary-le-bone Park* (not within the parish of *Isleworth*)

(*f*) *Ante* 397. (*g*) 3 *Esp. Rep.* 91.

had been thrown from the cart, within the parish of *Isleworth*, and severely bruised; so much so as to render it unsafe to remove him. He was brought to the plaintiff's house, where he was kept and attended for ten days, until he recovered. It was also proved, that when *Shaw* was brought to the plaintiff's house, he (the plaintiff) sent to one of the overseers, to inform him of it; the overseer directed the person who brought the message, to go to the beadle, and also desired him to assist in taking care of the man. It appeared, that *Shaw* was a weekly servant to Mr. *Willan*; and that after he had recovered, the plaintiff applied repeatedly to Mr. *Willan*, to pay him for the expences incurred in taking care of *Shaw*; and sent him a bill amounting to 8*l.* 18*s.* 6*d.*; Mr. *Willan* offered him 5*l.* 5*s.*, which he refused to take; and he then applied to the parish officers, and sent in a larger bill to them: it also appeared, that after the man had recovered, the vestry had made an order, stating, "That as an encouragement to humanity, they had ordered *Simmons* five guineas; but at the same time, protested against their liability to reimburse him for the expences incurred, knowing *Shaw* to be a servant of Mr. *Willan*, and conceiving Mr. *Willan* liable; and the five guineas was merely voted as a voluntary donation or reward for his humanity. This sum the plaintiff also refused to accept, and brought this action against the defendants as parish officers, for all the expences incurred.

Lord *Eldon*, Ch. J. said: "The questions in this case are, 1st, Whether *Simmons* in point of law, has a demand against the parish officers, either from the liability imposed upon them by law to take care of casual poor, or by express agreement? and, 2dly, Whether, having such demand, he has relinquished it, and bound himself to adhere to the demand he first made against *Willan* as the master of *Shaw*? The case is new to me. It has been decided, (b) that if a servant in husbandry has received relief from the parish officers, they cannot recover it against the master, as not being of that description of servants for whom the master is bound to provide; but that if he was of that description the parish officers could recover. Lord *Kenyon* has ruled, (i) that when a servant, living under the roof of his master falls sick, the master

(b) *Ante*, 230. (i) *Ibid.*

is liable for medicines provided for the servant, if his illness has not been the consequence of his own misconduct or debauchery. If *Shaw* had been a servant of that description, *Willan* would have been liable; but it does not follow that, because *Willan* might be liable, the parish officers are thereby excused. It comes to this point, was the person relieved within the description of casual poor? if he was, the parish officers are bound to take care of him: a common person would not; but if a common person does take care of him, on the liability of the parish officers, I think he has a right to recover against them.

With respect to the application, in the first instance, to *Willan*, the plaintiff might have reasoned thus: 'I will try to get the money from *Willan*, in order to relieve the parish.' That alone will not discharge the parish officers; there must have been some express abandonment of his claim against the plaintiffs, and an admission that he would look to *Willan* alone. He has acted imprudently, perhaps wrong, in sending in a bill to the parish officers larger than the one he sent in at first to *Willan*; and he must be bound by the first bill; but even if the jury should think 8*l.* 18*s.* 6*d.* too much, and that five guineas is sufficient; if under all the circumstances, and the law as I have stated it, the jury should be of opinion that the parish officers are liable, I think they must give a verdict for five guineas, notwithstanding the order of vestry; for I do not think the order of vestry, protesting against their liability, and offering it as a voluntary kindness, can be considered as a tender of so much."

3. Of Contracts with Parish Officers respecting the Maintenance, &c. of Bastard Children.

The statute 6 Geo. II. c. 31. only authorizes parish officers to take security from the putative father of a bastard child to indemnify the parish; and therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum, as the amount of the charge actually sustained by the parish, which tender was found for the defendant; the court held, that the plaintiffs could not recover further upon the note.

(k) 6 *East Rep.* 110.

Thus,

Thus, in the case of *Cole* and others v. *Gower* and *Piggott*,^(k) which was an action of *assumpsit* on a promissory note for 6*l.* The defendants pleaded *non assumpsit* as to all but 5*l.* and a tender of that sum. The facts were shortly these: On the 22d of *January* 1803, one *Mary Taylor*, single woman, being a pauper of the parish of *Pulloxhill*, swore a bastard child (of which she was then pregnant) to *Gower*, one of the defendants, who was apprehended under a warrant. Shortly after his arrest he offered to compromise the affair with the parish, and to pay the defendants (the parish officers) 20*l.* if they would give him time; and they agreed to take the 20*l.* which was to be paid by three instalments, to be secured by three joint promissory notes of the defendants, to bear date respectively the 8th of *April*. The first (whereon the present action is brought) at two months date for 6*l.*; the second at twelve months for 7*l.*; the third at twenty-four months for 7*l.* The three notes were accordingly prepared and executed. The first note became due on the 11th of *June* 1803, and on the 17th of the same month *Mary Taylor*, the pauper, was delivered of a still-born bastard child in the parish of *Pulloxhill*. And the defendants being called upon to discharge their first note, tendered 5*l.* in part payment of it, but refused to pay the remaining 20*s.*, urging that 5*l.* was the full extent to which the parish had been damnified. The defendants, at the trial, proved their plea of tender of the 5*l.*; and the plaintiffs did not make out in evidence, that the parish had been damnified to above the amount of 5*l.* but on the contrary, that they had only expended 3*l.* 14*s.* by reason of the premises. The question for the opinion of the court was, whether the plaintiffs were entitled to recover.

The court determined, that the plaintiffs were not entitled to recover more than the sum paid into court.

Lord *Ellenborough*, Ch. J. said: "I am of opinion that the plaintiffs are not entitled to recover beyond the sum paid into court, whether considering the contract as void upon principles of public policy, or considering it with relation to the individuals with whom it was made, as a contract for gain or loss by persons clothed with a public trust, upon the subject matter of their

(k) 6 *East Rep.* 110.

trust, and giving them an interest in the mal-execution of it. It is a shocking consideration that by means of such a security as this the parish officers, who have a public duty imposed upon them to take care that the father shall make a proper provision for the maintenance of the child, acquire an interest that the child should live as short a time as possible. In the case, even of a private trustee, the Court of *Chancery* will not permit him to become a purchaser of an estate which he is entrusted to sell, because it gives him an interest to lessen the purchase money. Considering the security, as given to the parish officers only in their individual capacity, it is giving them a temptation to deal with negligence, at least, in that most important trust, the care of children of tender age, which is committed to them. But if made to them in their representative character, and the parish were to receive the benefit of the money when recovered, which was the manifest intention of the parties, it is placing parish officers in a situation which the legislature did not mean to do, and which public policy forbids. The law did not mean to make this a matter of speculation of loss or gain to the parish: it is said, that the security shall be given to them in order to *indemnify* the parish. I therefore consider the law as having spoken upon the subject; and it having said, that the security shall be taken for an indemnity, it has excluded every other consideration. The parish officers are not to speculate, but to take the security, as a matter of public duty, in the form prescribed by the act: and taking it in the form they have done is contrary both to the direct letter and to the general policy of the law."

Lawrence, J. said: "I agree with the rest of the court upon the construction of the statute, though I confess I have had some doubt upon the inexpediency of the practice which has prevailed; for it may often happen that the putative father may be able to procure friends to enter into security for him to a certain amount, who would not undertake to indemnify the parish to an indefinite extent: and they may thus be left without any other security, than the precarious future responsibility of the putative father himself. The statute, however, certainly meant merely to indemnify the parish, and not to create a speculation of loss or profit to them upon the life or death of the child; and the parish officers should have

no temptation to be careless in the execution of their trust. And it must be admitted that they will not have the same interest to take care of the child, for whose maintenance they have received security for a sum certain, as if it were taken only for their indemnity. Upon the whole therefore, weighing the inconveniences on either side, it is better to abide by the strict letter of the statute."

CHAPTER IX.

Of Trustees.

A BREACH of trust, in some instances, may be the ground of an action of *assumpsit*, though the usual remedy is by bill in equity.

Thus, in the case of *Smith and others v. Jameson and another*, (a) where a trustee having received trust-money, applied it to his own use, in the way of his trade : the court held, that he was liable to an action of *assumpsit*, for money had and received, for the money so misapplied.

But trustees, by submitting matters of trust to arbitration, do not make themselves *personally* liable, except so far as they have effects of the trust-estate.

Thus, in the case of *Davies v. Ridge and others*, (b) which was an action of *assumpsit* upon an award, and for money had and received, against the defendants, as trustees of a Mr. *Pigot*, of *Peplow* in *Shropshire*. The plaintiff had been a judgment creditor for 9,000*l.*, part of which had been paid, and it had been referred to arbitration, to ascertain how much was really due upon the judgment. The arbitrators had made an award in favour of the plaintiff.

Lord *Eldon*, Ch. J. said : " The plaintiff must show the defendants had effects of the trust-estate ; submitting to arbitration did not make them *personally* liable."

(a) 5 Term Rep. 601. See also *Willes Rep.* 405. S. P.

(b) 3 Esp. Rep. 101.

It was proved that one of the trustees had admitted, that he had money of the trust-estate in his hands : and upon this evidence it was submitted, that the admission of one of them bound the rest.

Lord *Eldon* said : " It would, if they were all *personally* liable ; but not where they are only trustees."

CHAPTER X.

Of Bankrupts and their Assignees.

The Subject of the present Chapter will be considered under the following Heads:

1. *Of a Bankrupt's Certificate and Discharge from Debts, &c.*
2. *Of the Action of Assumpsit by a Bankrupt, relating to Property which he holds in Trust.*
3. *Of Contracts made with an uncertificated Bankrupt.*
4. *Of a Bankrupt's Allowance, &c.*
5. *Of Promises to pay a Debt barred by a Bankrupt's Certificate.*
6. *Of the Assignment of a Bankrupt's Estate to his Assignees; and of their Right to receive and discharge Debts, and prosecute Actions, &c.*
7. *Of Payments, &c. made to, or by a Bankrupt, when protected.*
8. *In what Cases an Action of Assumpsit will lie at the Suit of Assignees for Money received of a Bankrupt, either in Contemplation of, or after an Act of Bankruptcy.*
9. *Of*

9. *Of an Action at Law by Assignees, for Money or Goods belonging to a Bankrupt abroad, attached at the Instance of a Creditor residing in England, after Notice of the Assignment, &c.*
10. *In what Cases Assignees are liable to an Action of Assumpsit for Rent, and for Money had and received, &c.*
11. *Of the Assignee's Liability to an Action of Assumpsit for a Dividend, and for an Allowance to a Witness, &c.*
12. *Of Monies received by Assignees, who have been removed, &c.*
13. *Of Promises to pay Money in Consideration that the Assignees will forbear to examine the Bankrupt, or will stay Proceedings under the Commission, &c.*

*1. Of a Bankrupt's Certificate and Discharge
from Debts, &c.*

By the statute 5 Geo. II. c. 30. s. 7. it is enacted, "That all and every person and persons so become, or to become bankrupts, who shall in all things conform, as in and by this act is directed, shall be discharged from all debts, by him, her, or them due or owing at the time that he, she, or they did become bankrupt. And in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded for any debt due before such time, as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail, and shall and may plead in general, that the cause of such action or suit did accrue before such time as he, she, or they became bankrupts, and may give this act, and the special matter in evidence; and the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be sufficient evidence of the trading, bankruptcy, commission, and other proceedings, precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff, in such action, can prove the said certificate was obtained unfairly and by fraud, or unless the plaintiff, in such action, can make appear any concealment by such bankrupt to the value of ten pounds; and if a verdict pass for the defendant, or the plaintiff should become nonsuited, or judgment be given against the plaintiff, the defendant shall recover his full costs."

But by sect. 9. it is provided and enacted, "That in case any commission of bankruptcy shall issue against any person or persons, who shall have been discharged by virtue of this act, or shall have compounded with his, her, or their creditors, or delivered to them, his, her, or their estate or effects, and been released by them, or been discharged by any act for the relief of insolvent debtors after the time aforesaid, that then, and in either of those cases, the body and bodies only of such person and persons, conforming as aforesaid, shall be free from arrest and imprisonment, by virtue of this act; but the future estate and effects of every such person and persons shall remain liable to his, her, or their creditors, as before

fore the making of this act, (the tools of trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt, and his wife and children only excepted,) unless the estate of such person or persons, against whom such commission shall be awarded, shall produce clear, after all charges, sufficient to pay every creditor, under the said commission, *fifteen shillings in the pound, for their respective debts.*"

And by the 10th section of the same act, it is also provided and enacted, " That no discovery, upon oath, or solemn affirmation, to be made by any bankrupt or bankrupts, of his, her, or their estate and effects, pursuant to this act, shall intitle such bankrupt or bankrupts to the benefits allowed by this act, unless the commissioners, authorized by such commission, or the major part of them, shall, in writing under their hands and seals, certify to the *Lord Chancellor* or *Lord Keeper*, or commissioners for the custody of the Great Seal of *Great Britain*, for the time being, that such bankrupt or bankrupts hath or have made a full discovery of his, or her estate and effects, and in all things conformed himself, herself, or themselves, according to the directions of this act; and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all such bankrupt's estate and effects; and unless four parts in five in number and value of the creditors of such bankrupt or bankrupts, who shall be creditors for not less than twenty pounds respectively, and who shall have duly proved their debts under such commission, or some other person by them respectively duly authorized thereunto, shall sign such certificate, and testify their consent to such allowance and certificate, and to the said bankrupt's discharge, in pursuance of this act, to be also certified by such commissioners; but the said commissioners shall not certify the same, till they shall have proof by affidavit or affirmation, in writing, of such creditors, or of the person by them respectively authorized for that purpose, signing the said certificate, and of the power and authority by which any person shall be authorized by any creditor to sign such certificate for any creditor; which affidavit or affirmation, together with such warrant or authority to sign, shall be laid before the *Lord High Chancellor*, *Lord Keeper*, or commissioners of the Great Seal, with the said certificate, in order for the allowing and confirming the same; and unless such bankrupt make oath, or, being of the people
called

called Quakers, solemnly affirm, in writing, that such certificate and consent of the creditors thereunto were obtained fairly and without fraud, and unless such certificate shall, after such oath or affirmation of the bankrupt, be allowed and confirmed by the *Lord Chancellor, Lord Keeper, or commissioners for the custody of the Great Seal of Great Britain*, for the time being, or by such two of the Justices of the Court of *King's Bench, Common Pleas, or Barons of the Court of Exchequer at Westminster*, to whom the consideration of such certificate shall be referred by the *Lord Chancellor, Lord Keeper, or commissioners of the Great Seal*, for the time being; and any of the creditors of such bankrupt are to **be** allowed to be heard, if they shall think fit, before the respective persons aforesaid, against the making such certificate; and against the confirmation thereof; nor shall any commissioner sign such certificate till after four parts in five in number and value of the said creditors shall have signed the same as aforesaid."

And by the 12th section of the act it is further provided and enacted, "That nothing in this act shall be construed to extend, or give or grant any privilege, benefit, or advantage, to any bankrupt whatsoever, against whom a commission of bankrupt, under the Great Seal of *Great Britain*, since the said fourteenth day of *May*, which was in the year of our Lord one thousand seven hundred and twenty-nine, hath issued, or hereafter shall issue, who hath or shall, for or upon marriage of any of his or her children, have given, advanced, or paid above the value of one hundred pounds, unless he or she shall prove, or by his or her books fairly kept, or otherwise, upon his or her oath, or being of the people called Quakers, upon solemn affirmation, before the major part of the commissioners in such commission named and authorized, that he or she had at the time thereof, over and above the value so given, advanced or paid, remaining in goods, wares, debts, ready money, or other estate real or personal, sufficient to pay and satisfy unto each and every person, to whom he or she was anywise indebted, their full and intire debts; or who hath or shall have lost in any one day, the sum or value of five pounds, or in the whole the sum or value of one hundred pounds, within the space of twelve months next preceding his, her, or their becoming bankrupt, in playing at or with cards, dice, tables, tennis, bowls, billiards, shovel-board, or in or by cock fighting, horse

horse races, dog matches, or foot races, or other pastimes, game or games whatever, or in or by bearing a share or party in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run as aforesaid; or that within one year before he or she became bankrupt, shall have lost the sum of one hundred pounds, by one or more contracts for the purchase, sale, refusal, or delivery of any stock of any company or corporation whatsoever; or any parts or shares of any government or public funds or securities; where every such contract was not to be performed within one week, from the time of the making such contract, or where the stock or other thing, so bought or sold, was not actually transferred or delivered in pursuance of such contract."

By the stat. 7 Geo. I. c. 31. s. 2. it is also enacted, "That all and every person or persons, who now are or shall become bankrupts, shall be discharged of and from all and every bill, bond, promissory note, or other personal security for money, payable at the end of three, four or six months, or any other future days of payment, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such sum of money had been due and payable before the time of his becoming a bankrupt."

*This stat
only relates
to writing
securities
of Stat 438*

The stat. 10 Ann. c. 15. s. 3. enacts, "That by the discharge of any bankrupt or bankrupts by force of that act, or any other acts relating to bankrupts, from the debts by him, her or them due and owing, at the time that he, she or they did become bankrupt, shall not be construed, nor was meant or intended to release or discharge any other person or persons, who was or were partner or partners with the said bankrupt in trade, at the time he, she, or they became a bankrupt, or then stood jointly bound, or had made any joint contract together with such bankrupt or bankrupts, for the same debt or debts, from which he was discharged, as aforesaid; but that notwithstanding such discharge, such partner and partners, joint obligor and obligors, and joint contractors, with such bankrupt and bankrupts, as aforesaid, shall be and stand chargeable with and liable to pay such debt and debts, and to perform such contracts, as if the said bankrupt and bankrupts had had never been discharged from the same."

A bank-

A bankrupt's certificate is a discharge from all *debts*, due or owing by him at the time of his bankruptcy, which were proveable under his commission; and it is a bar against all creditors, whether they have signed the certificate or not (*a*). A certificate, however, is no bar to a contract which does not relate to the payment of money; but is for the doing or forbearing to do some other act.

So, a certificate does not discharge a bankrupt from a contingent debt, which is not reduced to a certainty before the act of bankruptcy is committed, because it cannot be proved under the commission: and in questions whether a debt is discharged or not by a certificate, the point agitated has always been, whether it could be proved or not; the creditor's right to prove, and the bankrupt's right to be discharged by the certificate, being reciprocal and co-extensive (*b*).

Therefore, where A. lent his acceptances to the bankrupt, who gave him a receipt as for so much money, the acceptances did not become due till after the bankruptcy. It was held that the certificate did not bar, and that the receipt did not create a debt proveable (*c*).

So, if a person lends a trader stock in the public funds, to be replaced as stock, without naming any particular time at which it is to be invested: if he becomes bankrupt before he has been required to replace the stock, it is a contingent debt, and cannot be proved (*d*); for it is clear, that where there is only a cause of action existing, and the debt is to arise on a stipulation which has not been broken, previous to the time of the bankruptcy, and the debt remains to be inquired into, there the creditor cannot prove his debt under the commission, and the demand will remain undischarged by the certificate (*e*).

So, in the case of *Parflov v. Dearlove* (*f*), it was determined that money payable half yearly for the education and board of the children of a bankrupt, is not a debt due till the end of the half

(*a*) See *Co. bankrupt laws*, 465, 471, &c.; and as to what debts may or may not be proved under the Commission, vide *same book*, cap. 6.

(*b*) *Ibid.* 503.

(*c*) *Snaith v. Gale*, 7 *Term Rep.* 364.

(*d*) *Ibid.* 197.

(*e*) *Ib.* 199. 4 *Term Rep.* 571.

(*f*) 4 *Eggt Rep.* 438.

year, so as to be proveable under a commission of bankrupt against the parent, who became bankrupt a few days before the end of the half year, though he had just before his bankruptcy, taken his son home for the holidays, the contract not being thereby put an end to: and consequently the bankrupt's certificate, under the stat. 5 G. II. c. 30. is no bar to an action against him for the half-year's education, &c. The stat. 7 G. I. c. 31. § 1. which enables debts payable at a future day to be proved under the commission, is confined to written securities.

So, in the case of *Bamford v. Burrell* (g), it was held, that a debt *which* accrued subsequent to an act of bankruptcy, and previous to the issuing of the commission, is not barred by the certificate.

So, where a man undertakes to pay a sum of money for another, his undertaking alone will not create a debt that he can prove under a commission; and if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only resort to the bankrupt personally. But if the party engaging to pay the debt of another is taken in execution for that debt, his imprisonment is considered as a payment and satisfaction of the debt, sufficient to give him a right of proving under the commission.

Thus, in the case of *Chilton v. Whiffen* and another (h), which was an action of *assumpsit*, wherein the plaintiff declared, that the defendants and one *William Hinkley* were co-partners in trade and merchandize; that *Hinkley* drew a bill of exchange upon the plaintiff, dated the 18th day of *March* 1766, for 65*l.* payable to one *Robert Clay*, or his order, fifty-five days after date; and in consideration that the plaintiff would accept the said bill, the defendants undertook and promised to find money to pay the bill, take it up, and to save the plaintiff harmless and indemnified, by reason of his acceptance thereof; that he accepted the bill, which became due the 16th of *May* 1766, and was indorsed by *Robert Clay* to *Heathfield* and *Smith*, who, on the 15th of *September* 1766, sued out process, and caused plaintiff to be arrested and held to bail for the said 65*l.*; that, on the 24th of *November* 1766, he put in bail to that action; and in *January* 1767, was surrendered to the marshal of the Marshalsea, was charged in execution for the

(g) 2 *Bos. & Pul.* 1.(h) 3 *Will.* 13.

debt of 65*l.* and costs, and remained in execution. The defendant pleaded his certificate in bar, and that he became bankrupt on the 16th August 1766.

Lord Chief Justice *Wilmot* delivered the opinion of the Court as follows: "That no debt was due or owing from the defendants to the plaintiff, until he was charged in execution, and his body being in prison, upon judgment and execution, for a certain sum, is the very same thing as if the plaintiff had paid the debt and costs due on account of the bill and note; and then, and not before, the defendants became indebted to the plaintiff; which being after the defendants became bankrupts, the plaintiff could not come in under the commission. No debt could be barred by the certificate, but what was a debt contracted with certainty before the act of bankruptcy. Did the defendants owe to *Chilton* 30*l.* 10*s.* and costs, before he rendered his body in satisfaction thereof? which we take to be the same thing as if he had actually paid the debt and costs thereof. They certainly did not. They had promised to pay the money, or furnish the plaintiff, *Chilton*, with money to take up the bill, and to save him harmless. They broke their promise: *Chilton* was terrified and arrested. Here is an injury to a certain degree, but no debt owing by the defendants to *Chilton* before his body was in execution for the certain sum. How could the plaintiff, *Chilton*, at the time of the commission of bankruptcy issued, have sworn to a debt before he had advanced a shilling to the defendants? He certainly could not, but now his body being in execution, he has thereby paid the debt, and consequently may support the present action."

So, in the case of *Young v. Hockley*, (i) where the bankrupt, on the 25th June 1769, drew a bill of exchange on *Young* for 57*l.* 5*s.* 4*d.* payable one month after date, to his own order, which *Young*, on the same day, accepted. ^{in the account of the bankrupt} On the 12th July, a commission of bankrupt was issued against the defendant. The bill became due the 28th July, when *Young* paid it. The bankrupt obtained his certificate on the 5th of September 1769, which was allowed on the 23d October. The Court were of opinion that the certificate was no bar to the action brought by *Young*, and that the point was now entirely settled.

(i) 2 Bl. Rep. 839. See also 3 Wils. 528. Doug. 166. n. 55. S. P.

So,

So, in the case of *Taylor v. Mills and Magnall*,^(k) which was an action of *assumpsit* for money paid. The facts were these : the defendants were partners with one *Bailey* ; and, in order to raise money, they had entered into certain bonds. In the year 1765, *Bailey* withdrew from the partnership, and wishing to be discharged from these bonds, application was made to *Taylor* to become surety instead of *Bailey*, to which he consented : upon which the former bonds were cancelled. The bonds became due, and afterwards *Mills* and *Magnall* became bankrupts. When the obligees had got as much as they could from the partnership estate, and which amounted to no more than 6s. in the pound, they came upon the plaintiff for the residue. He accordingly paid it, and then brought his action for money paid, laid out, and expended.

The Court held that the action would lie. Lord *Mansfield* said, “ this case is not harder than every other case of a debt arising after bankruptcy, upon a pre-existing ground. At the time of the bankruptcy, the defendants were not indebted to *Taylor* ; he clearly, therefore, could not come in as a creditor under the commission. He was not damaged at that time ; and till damaged, (which he could not be till he had been called upon and had paid) he could not bring an action. He did not pay till after the commission issued ; consequently his whole damage and cause of action arose after the bankruptcy, and therefore could not be discharged by the certificate. With respect to the money received by the original creditors, under the commission, it is a discharge of so much of the debt, and the surety is only liable for the remainder ; consequently he can recover no more against the defendants. But as to that, he is a new creditor, and therefore is not barred by the certificate. It is an extremely clear case, and not different from any where the cause of the action, though it arises after the bankruptcy, is founded on a pre-existing ground.

So, in the case of *Paul v. Jones* ^(l), it was determined that a surety who does not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, may maintain an action of *assumpsit* for money paid, laid out, and expended, notwithstanding the bankrupt's certificate.

(k) *Cowp.* 525. (l) 1 *Term Rep.* 599.

But where a surety will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action of assumpsit for money paid, but must prove his debt under the commission, the bond being the debt (m).

The bankrupt laws being now adopted in *Ireland*, if a trader there becomes a bankrupt, and obtains his certificate, it will operate as a discharge in an action brought here upon a debt arising in *Ireland*.

Thus, in the case of *Ballantine v. Golding*, (n) which came before the Court of *King's Bench*, on a motion to enter an *exoneretur* on the bail piece, it appeared that the defendant had been a bankrupt, and obtained a certificate under the Great Seal of *Ireland*.

The original demand arose upon a bill of exchange drawn in *Ireland*, and payable by the defendant, who resided there.

Lord *Mansfield* said, "It is a general principle, that, where there is a discharge by the law of one country, it will be a discharge in another; that he remembered a case in *Chancery* of a *cessio bonorum* in *Holland*, which is held a discharge in that country, and it had the same effect here. The rule was accordingly made absolute.

But a certificate in a foreign country will not bar a debt contracted in this country.

Thus, in the case of *Smith* and another v. *Buchanan* and another (o), which was an action of *assumpsit* for goods sold and delivered. The defendant pleaded first, *non-assumpsit*; secondly, for a further plea in discharge of the persons, estate, and effects of the defendants, except any property, if any there be, after the date of a certain deed, dated 23d of *September* 1799, aftermentioned, acquired or to be acquired by the defendants, by descent, devise, bequest, or in course of distribution; they say that by a certain law of the state of *Maryland*, made on the 10th of *April* 1787, intituled, "An Act respecting insolvent debtors;" it was enacted, that any debtor for any sum above 300*l.* might apply by petition to the Chancellor of the said

(m) 2 *Term Rep.* 100. 640. 7 *Term Rep.* 97.

(n) *B.R. Mich.* 24 *Geo.* 111. *Co. bankrupt laws*, 499. See also *Burrows v. Jemino*, 2 *Stra.* 733. *S. P.*

(o) 1 *East Rep.* 6. *Vide Co. bankrupt laws*, 500.

state, and offer to deliver up all his property to his creditors, a schedule whereof, with a list of creditors, should be exhibited therewith; and thereupon the Chancellor might direct personal notice of such application to be given to the creditors, or as many as could be served therewith, or he might direct the notice to be published in the newspapers; and, on the appearance of the creditors, or their neglect to appear on due notice, the Chancellor might administer an oath to the debtor, binding himself to deliver up and transfer to his creditors all his property, &c. in such manner as the Chancellor should direct; and that the Chancellor should thereupon appoint a trustee on behalf of the creditors, and should direct such debtor to execute a deed to such trustee of all his property, debts, rights, and claims, in trust for the creditors;” and thereupon, and upon the execution of the said deed, and after the delivery of the property, books, bonds, and other evidences of debts, to such trustee, and his certificate of such delivery, the Chancellor might order that such debtor should for ever thereafter be acquitted and discharged from all debts by him owing or contracted, at any time before the date of such deed;” and in virtue of such order, such debtor should be for ever so discharged: provided that any property thereafter acquired by such debtor by descent, devise, bequest, or in course of distribution, should be liable to the payment of his debts. The plea further stated, that, after the making of that law, the defendants were joint debtors for more than 300*l.*; that they petitioned the Chancellor, and offered to deliver up all their property to the use of their creditors, with the schedule and list of creditors thereunto annexed; that thereupon the Chancellor gave the due notice to the creditors, and administered the oath to the defendants, and appointed one *S. Moale* trustee on behalf of the creditors; and directed the defendants to execute a deed to the said *S. M.* for all their property, debts, rights, and claims, &c. in trust for their creditors; that thereupon the defendants did accordingly, on the 23d of *September*, 1799, execute such deed of that date, and did then deliver up to the said *S. M.* as such trustee, &c. all their property, books, &c., who thereupon certified such delivery to the said Chancellor; and thereupon the Chancellor, according to the said act, ordered, that the defendants should forever thereafter be acquitted and discharged from all debts by them owing or contracted, before the date of the said deed; except that any property afterwards acquired by them, by descent, &c. should be liable to the payment

of their debts. The defendants then averred that they, at the time when the several causes of action in the declaration mentioned accrued, and until and at the time of the said order of discharge, were inhabitants, and resident in the said state of *Maryland*, and that the said several causes of action accrued, and were owing before the date of the said deed of trust executed by the defendants to *S. M.* Wherefore they prayed judgment, and that their persons, estates, and effects, save and except any property, if any, acquired after the date of the said deed, by the defendants, by descent, &c. might be discharged, &c. A third plea contained the same facts, together with an averment that the defendants had not, since the date of the trust deed, acquired any property by descent, &c. and concluded in bar of the action generally. The replication to these two pleas stated, that the causes of action in the declaration mentioned severally accrued to the plaintiffs within this kingdom of *England*: to which there was a general demurrer and a joinder therein.

Lord *Kenyon*, Ch. J. said, "It is impossible to say that a contract made in one country, is to be governed by the laws of another. It might as well be contended, that if the state of *Maryland* had enacted that no debts due from its own subjects to the subjects of *England* should be paid, the plaintiffs would have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country, suing on a lawful contract made here? How can it be pretended that he is bound by a condition to which he has given no assent, either expressed or implied? It is true, that we so far give effect to foreign laws of bankruptcy, as that assignees of bankrupts, deriving titles under foreign ordinances, are permitted to sue here for debts due to the bankrupt's estates; but that is because the right to personal property must be governed by the laws of that country, where the owner is domiciled. That was recognised in the case of *Hunter v. Potts* (q). The court there considered the assignment of the bankrupt's effects in another country,

(q) 4 Term Rep. 182 and 192.

although

although in fact made *in invitum*, as equivalent here to a voluntary conveyance by him. The case of *Ballantine v. Golding* (r), is very distinguishable from the present; for there the debt was contracted in *Ireland*, where the commission issued. But in the same page of the book from whence that was quoted,* is to be found an opinion of Lord *Talbot's*, directly contrary to the conclusion we are desired to draw in this case; for there he held that, though the commission of bankrupt issued here attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being sued there for a debt arising therein. The same rule then must prevail here."

Lawrence, J. said, "If the defendants had made a voluntary assignment of all their property to the use of their creditors, it is not pretended that that would have been a bar to the suit of the plaintiffs: and yet the title of the assignee would have been as valid here as under the foreign commission; which shows that the validity of the title, under such an assignment, cannot make any difference in the present argument. Then it rests solely on the question, whether the law of *Maryland* can take away the right of a subject of this country to sue upon a contract made here, and which is binding by our laws. This cannot be pretended, and therefore the plaintiffs are entitled to judgment."

The other Judges concurred, and judgment was given for the plaintiffs.

2. *Of the Action of Assumpsit by a Bankrupt, relating to Property which he holds in Trust.*

Property in which a bankrupt has only a trust estate does not pass to his assignees under the assignment. Therefore the *cestui que* trust cannot bring any action respecting such property in their names, but ought to bring it in the name of the bankrupt.

Thus, in the case of *Carpenter and others v. Marnell*, (s) which was an action of *assumpsit* on a note in these words: "I promise to pay to Mr. *Joseph Fowler*, or order, the sum of 150*l*, being the remainder of the consideration for the assignment of his interest

(r) *Ante* 416.

* *Co. Bkpt. Laws*, 500.

(s) 3 *Bos. & Pull.* 40.

in the *Layton* business with me, as soon as I shall receive, ~~or~~ may receive the money due, upon the completion of the said business, from T. B. esquire, his executors, administrators, or assigns, or immediately upon my receiving letters of administration of the estate and effects of *Lieutenant General Joseph Walton, otherwise Brome*, deceased, which ever event shall first take place ;” signed, “*Richard Marnell*.” This note was indorsed by *Fowler* to one *James Bagster*, for a valuable consideration, after which *Fowler* became bankrupt, and the plaintiffs were chosen his assignees ; in which capacity they now sued for the benefit of *Bagster*.

Lord *Alvanley*, Ch. J. said, “ We are all of opinion that this action ought to have been brought by *Fowler*. He was the person to whom the promise to pay was made ; he by his indorsement directed the contents of the note to be paid to *Bagster* ; and though this indorsement had no legal effect, yet it passed the beneficial interest in the note to *Bagster* ; and *Fowler* by the indorsement became a mere trustee for him. The assignees never were in a situation to derive any benefit from this piece of paper. If, indeed, they had possessed the most remote possibility of interest, or if they could state any thing from which a benefit to the creditors would result, I should hold that the action might be maintained ; but at the time when they brought this action it was impossible for them not to know that they had no right to the note. They bring the action in the character of trustees ; but they are not trustees for *Bagster* ; they are only trustees for *Fowler*’s creditors, and therefore cannot sustain this action.”

So, in the case of *Winch v. Keeley*, (1) which was an action of *assumpsit* for work and labour, &c. The defendant pleaded bankruptcy in the plaintiff. The plaintiff replied, that before his bankruptcy he was indebted to one *Joseph Searle* in 73*l.* 12*s.* 9*d.*, and being so indebted he, on the 20th *October*, 1785, by his certain deed-poll, did bargain, sell, assign, and transfer to the said *Joseph Searle* the said sum of 73*l.* 12*s.* 9*d.* parcel of the money in the said declaration mentioned ; to hold the same to the said *Joseph Searle* from thenceforth to his own proper use, under a certain proviso, therein and hereinafter mentioned ; and did thereby constitute and appoint the said *Joseph Searle* his true and lawful attorney irrevoc-

(1) 1 Term Rep. 619.

cably, and did give and grant unto him, his executors and administrators, full power and authority in his name, to the only proper use and behoof of the said *Joseph*, to ask, demand, and sue for, the aforesaid sum of 73*l.* 12*s.* 9*d.*, provided always, that if he, the said plaintiff, his executors, or administrators, should well and truly pay, or cause to be paid, unto the said *Joseph*, the said sum of 73*l.* 12*s.* 9*d.*, so due and owing to him as aforesaid, within two calendar months after the date of these presents, then the said deed-poll, and every article and clause therein contained, should be void; as by the said deed-poll, relation being thereunto had, would more fully appear. And the said plaintiff further saith, that he did not, at any time within the space of two calendar months after the date of the said deed, pay to the said *Joseph* the said sum of 73*l.* 12*s.* 9*d.* so due and owing to him as aforesaid, but that the same hath from thence hitherto remained due and unpaid from the said plaintiff, to the said *Joseph*; and that the original writ, in this suit, was sued out in the name of him, the said plaintiff, for and on behalf of the said *Joseph Searle*, and for the purpose of enabling the said *Joseph Searle* to receive the said sum of 73*l.* 12*s.* 9*d.* parcel of the said sums in the said declaration mentioned, according to the form and effect of the said deed poll, and not for the benefit, use, or behoof, of the said plaintiff. To this replication there was a general demurrer and joinder.

The court determined that the bankrupt might sue in his own name for the benefit of the assignee of the debt in question, and gave judgment for the plaintiff accordingly.

3. *Of Contracts made with an Uncertificated Bankrupt.*

An uncertificated bankrupt may maintain an action in his own name, and for his own benefit, for work and labour, and materials found and provided.

Thus, in the case of *Silk v. Osborne*, (v) which was an action of *assumpsit* for work and labour and materials found and provided. The plaintiff proved the work done and the materials furnished by him; but in the course of the evidence it appeared, that the plain-

(v) 1 *Esp. Rep.* 140.

tiff, at the time of the work and labour, and of the trial, was an uncertificated bankrupt. It was therefore contended, that he could not maintain the action, as all his effects belonged to his assignees. In answer to this objection the counsel for the plaintiff relied on the case of *Chippendale v. Tomlinson*, (*) as decisive in the present instance; it being there expressly decided, that an uncertificated bankrupt could maintain an action for work and labour.

It was answered, for the defendant, that that case only went the length of deciding, that an uncertificated bankrupt could sue for, and recover any sum due to him for his *personal labour*; but that the present case was not confined to personal labour only, but embraced a more extensive cause of action, namely, for materials found; that these were a species of property, which passed under his assignment, and in which he therefore had no property whatever: so that even admitting that the action was maintainable by the bankrupt for work and labour, that for materials found, the action could not be supported.

Lord Kenyon, Ch. J., before whom the cause was tried, said, "That the case cited was certainly good law, and in principle strongly applicable to the present: that the assignees could not hire out the bankrupt, to make a profit of his labour for their benefit, but that for such demands, he should maintain an action in his own name; but his lordship added, that he was further of opinion, that where the materials furnished were necessary to the bankrupt's labour, that in such case the work and materials furnished became blended together, and formed one joint cause of action, upon which the bankrupt might sue, and was entitled to recover: that however the question might be between the bankrupt and his assignees, as they might certainly, take whatever personal property belonged to him, without any new assignment, that it did not lie in the mouths of third persons to set up such a defence."

So, in the case of *Evans v. Brown*, (w) it was held, that an uncertificated bankrupt might also sue for money lent after his bankruptcy.

* *Co. Bkpt. Laws*, 431. (w) 1 *Esp. Rep.* 170. See also *Laroche v. Wakeman*, *Peak's Cas. N. P.* 140. *Webb v. Ward*, 7 *Term Rep.* 296. *Webb v. Fox*, *ib.* 391. *S. P.*

Lord *Kenyon*, Ch. J. in this case said, "The loan was subsequent to the bankruptcy, and for any thing that appeared, the money might have been earned by the bankrupt after his bankruptcy: that if the law allowed him to maintain an action to recover what was due to him for labour, that he was equally intitled to maintain one for the money so earned by his manual labour, which he might have lent to a third person, and which might be, perhaps, the present case; and though when recovered, it would belong to the assignees, that in this case, and between the parties so circumstanced, it could not be set up in bar to this demand."

But, in the case of *Kitchen v. Bartsch*, (x) the court determined, that it is a good plea to an action on a promissory note, and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay them the money claimed by the plaintiff: and the plaintiff cannot reply that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit, and that the commissioners had made no new assignment of the notes and money to the assignees: *for all after acquired personal property passes under the general assignment.*

4. *Of a Bankrupt's Allowance, &c.*

A bankrupt may maintain an action of *assumpsit* against his assignees for his allowance under the stat. 5 Geo. II. c. 30. s. 7. But such an action will not lie if the certificate be not allowed before payment of the dividends; the bankrupt's only remedy, in such case, being by petition to the Lord Chancellor.

Thus in the case of *Groome v. Potts* and others, (y) which was an action of *assumpsit* by the plaintiff a certificated bankrupt against the defendants, who were the executors of *Neal*, the assignee under the plaintiff's commission, to recover 25*l.* 6*s.* 7*d.*, for money had and received to the plaintiff's use, for his allowance under the stat. 5 Geo. II. c. 30. s. 7., his estate having paid 10*l.* in the pound to his creditors. The commission issued in June, 1788, and *Neal*

(x) 7 *East Rep.* 53. (y) 6 *Term Rep.* 548. 1 *Ess. Rep.* 396 S. C.

was chosen an assignee, together with another person who did not act. In *March*, 1791, the commissioners declared a dividend of 12*s.* in the pound, making the usual order on *Neal*, the assignee, to pay that dividend to each of the creditors. In *July*, 1791, a final dividend of 7*½d.* in the pound was declared, and the same order was made by the commissioners on the assignee. *Neal* accordingly paid the creditors under these orders, which exhausted all the effects. In *July*, 1795, the plaintiff obtained his certificate. These facts having been proved at the trial before Lord *Kenyon*, Ch. J. it was objected that the plaintiff could not recover; for that at the times when the dividends were declared the bankrupt had not obtained his certificate, and was not therefore entitled to any allowance under the statute; and of this opinion was his lordship, and directed the plaintiff to be nonsuited. And upon a motion for setting aside the nonsuit, the Court of *King's Bench* held, that the action could not be supported.

Lord *Kenyon*, Ch. J. said: "If this defendant were answerable in this action, the assignees of a bankrupt would be in a very unfortunate situation. They are mere trustees, and act wholly under the direction of the commissioners. When a dividend is declared, a right of action against the assignees accrues to every creditor for his proportion. In this case two dividends were declared at a time when the plaintiff had not obtained his certificate, and when it was uncertain whether such certificate ever would be granted; the assignee paid the creditors under these orders of the commissioners; and the bankrupt, having four years afterwards obtained his certificate, now calls on the representatives of the assignees for his allowance under the statute: but it would be monstrous to subject them to this demand. A bankrupt must put himself in a situation to demand this allowance, by obtaining his certificate, before payment of the dividends by the assignees."

5. *Of Promises to pay a Debt barred by a Bankrupt's Certificate.*

Though a bankrupt is discharged by his certificate from all debts due at the time of the act of bankruptcy, yet he may voluntarily make himself liable on a new promise: for all the debts of a bank-

a bankrupt are due in conscience, notwithstanding he; has obtained his certificate. (z)

Thus, in the case of *Trueman v. Fenton*, (a) which was an action on a promissory note bearing date the 11th February, 1775, payable to one *Joseph Trueman*, (the plaintiff's brother,) three months after date for 67*l.*, and indorsed by him to the plaintiff. The declaration also contained other counts for goods sold and delivered, money had and received, and an account stated. The defendant pleaded his bankruptcy. And, upon the trial, a special case was reserved for the opinion of the court, stating the answer of the plaintiff, in this action, to a bill filed against him in the *Exchequer* by the present defendant for a discovery of the consideration of the note, the substance of which was as follows: "That on the 15th of *December*, 1774, the defendant *Fenton* purchased a quantity of linen of the plaintiff *Trueman*: and it being usual to abate 5*l. per cent.* to persons of the defendant's trade, the price after such abatement made, amounted to 126*l.* 18*s.* That at the time of the sale it was agreed, that one half of the purchase money should be paid at the end of six weeks, and the other half at the end of two months: And in consideration thereof, the plaintiff, *Trueman*, drew two notes of the defendant for 63*l.* 9*s.*, each, payable to his own order, at six weeks and two months respectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a discharge for the sum. He then denied that he had proved or claimed any debt or sum of money under the commission: but set forth, that he acquainted the defendant he was surprised at his ungenerous behaviour in purchasing so large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes: upon which the defendant pressed him to take up the notes, and proposed to give him a security for part of the debt. That afterwards on the 11th of *February*, 1775, the defendant called upon the plaintiff, and voluntarily proposed to secure to him the payment of 67*l.* in satisfaction of his debt, if he would take up the two notes, and cancel or deliver them up to the defendant. That the plaintiff agreed

(z) Vide 2 *Term Rep.* 765. (a) *Cowp.* 544. See also *Allop and another v. Brown*, *Doug.* 191. But a bankrupt cannot be held to special bail on such a promise, *Baily v. Dillon*, 2 *Bur.* 736. r 142

to accept this proposal with the approbation of his attorney, and desired the note to be made payable to his brother *Joseph Trueman* or order, three months after date. That he took up the two acceptances, and delivered them to the defendant to be cancelled, and accepted the above note for 67*l.* in satisfaction and discharge thereof. That a commission of bankruptcy issued against the defendant on the 19th of *January*, 1775, and that the bankrupt obtained his certificate, on the 17th of *April* following."

The Court of *King's Bench* decided, that the plaintiff was entitled to recover. And Lord *Mansfield*, Ch. J. said: "The general question is, whether a bankrupt *after* a commission of bankruptcy sued out, may not in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part, or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promise, it must be founded on the ground of its being, *nudum pactum*. As to that, all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. How far have the courts of Equity gone upon these principles? where a man devises his estate for payment of his debts, a court of equity says, (and a court of law in a case properly before them would say the same,) all debts, barred by the statute of limitations, shall come in and share the benefit of the devise; because they are due in conscience: therefore, though barred by law, they shall be held to be revived, and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the statute of limitations is very true, the slightest acknowledgement has been held sufficient; as saying: "prove your debt and I will pay you; I am ready to account, but nothing is due to you:" and much slighter acknowledgements than these will take a debt out of the statute. So in the case of a man who, after he comes of age, promises to pay for goods or other things, which, during his minority, one cannot say he has contracted for, because the law disables him from making any such contract; but which he has
been

been fairly and honestly supplied with, and which were not merely to feed his extravagance, but reasonable for him (under his circumstances) to have; such promise shall be binding upon him, and make his former undertaking good. Let us see then what the transaction is in the present case. The bankrupt appears to me to have defrauded the plaintiff by drawing him in on the eve of a bankruptcy, to sell him such a quantity of goods on credit. It was grossly dishonest in him to contract such a debt, at a time when he must have known of his own insolvency, and which it is clear the plaintiff had not the smallest suspicion of, or he would not have given credit, and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquishes all hope or chance of benefit from a dividend under the commission, by forbearing to prove his debt, gives up the securities he had received from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full satisfaction of his whole demand. Is that against conscience? is it not on the contrary a fair consideration for the note in question? He might foresee prospects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance; for till then he could get nothing by the mere imprisonment of his person. He uses no threats, no menace, no oppression, no undue influence, but the proposal first moves from, and is the bankrupt's own voluntary request. The single question then is, whether it is possible for the bankrupt in part, or for the whole, to revive the whole debt? As to that Mr. Justice Aiton has suggested to me the authority of *Baily v. Dillon*, (b) where the court would not hold to special bail, but thought reviving the old debt was a good consideration."

2^d fair
for him?
certainly not

Where a bankrupt promises to pay a debt due before his bankruptcy, the plaintiff may declare generally on the original consideration.

Thus, in the case of *Williams v. Dyde* and others, (c) which was an action of *assumpsit* for goods sold and delivered, the defendant pleaded his discharge under a commission of bankruptcy.

The plaintiff's counsel stated, that the defendant had promised to pay the debt after he was discharged by his certificate. Upon

(b) *Ante*, 425. n. a. (c) *Peck's Cas. N.P.* 68.

which

which the counsel for the defendant, objected that this promise could not be given in evidence under the count for goods sold and delivered. To avail himself of this promise, the plaintiff should have declared specially, that the defendant being indebted, and having been discharged under the commission, promised to pay the debt from which he had been so discharged.

But Lord *Kenyon*, Ch. J. said: "I think this declaration is sufficient as it stands. In cases where the statute of limitations has been pleaded, the replication that he did promise within six years has always been held sufficient; for the new promise revives the old debt."

Upon a promise by a bankrupt to pay a debt, due prior to his bankruptcy, *when he is able*, the plaintiff in an action on such promise must prove generally the ability of the bankrupt to pay at the time of the commencement of the action.

Thus, in the case of *Besford v. Saunders*, (d) which was an action of *assumpsit* for money paid, lent, had and received, &c. To which the defendant pleaded his bankruptcy. At the trial the plaintiff proved two several applications to the defendant, who admitted the debt after he had obtained his certificate, and said, "the plaintiff should be no loser, but that he would pay when he was able."

It was contended, that this was not an absolute promise, but that the plaintiff ought to show the defendant's ability to pay at the time of the action brought. Lord *Loughborough*, Ch. J., before whom the cause was tried, over-ruled this objection, and held, that the promise was absolute, and the benefit of the certificate waived, as to this debt. In consequence of which a verdict was found for the plaintiff.

But upon a motion for a new trial *Gould*, J. and *Heath*, J. were of opinion, that it was a conditional promise, and that the plaintiff ought to have shown that the defendant was able to pay.

Lord *Loughborough*, however, retained his former opinion, that the promise was not conditional, and that an inquiry into

(d) 2 H. Bl. 116.

the circumstances of the defendant, could not be a point in considering whether there were a debt or not.*

Where a bankrupt promises to pay a debt due prior to his bankruptcy, in consideration of the creditor's not proving his debt under the commission, if the creditor, to whom such promise is made, opposes the bankrupt in obtaining his certificate, such opposition is a waiver of the promise to pay, &c.

Thus, in the case of *Colls v. Lovell*, (c) which was an action in *assumpsit*, in which the plaintiff declared, "that the defendant having become a bankrupt and being then indebted to the plaintiff, in consideration that the plaintiff would not prove his debt under the commission, he undertook to pay him eighteen shillings in the pound, on his debt, and to bring forward another person to secure to him the payment of that sum;" it then averred, that the defendant had not paid, nor brought forward any person to secure to him that sum, by reason whereof the defendant became liable, &c.

Upon the trial, the plaintiff proved, by a witness, a treaty for an agreement in substance as stated in the declaration, but the witness, in his cross examination, admitted that the plaintiff had petitioned the Great Seal against the allowance of the defendant's certificate.

The counsel for the defendant then contended, that this was a waiver of the agreement, and deprived the plaintiff of all claim to any benefit to be derived under it.

Lord *Kenyon*, Ch. J. held that it did so, his lordship observed, "That the agreement upon which the present action was founded, must be supposed to have been entered into with a view to discharge the defendant from his debts, by the plaintiff's co-operating in the discharge, which the defendant would obtain by means of his certificate. That the plaintiff, by opposing the defendant's certificate, had been guilty of *mala fides*, as defeating the object of the agreement by an act totally inconsistent with it. That he should therefore be held, to have abandoned it, and not now be allowed to resort to it, or to maintain an action which had the agreement for its foundation.

* *Sed vide* *Cole v. Saxby*, *Ante tit.* *Infants*, 164. *contra.* (c) 1 *Esp. Rep.* 282.

An agreement made by a bankrupt, or any one on his behalf, to pay a sum of money to his creditor if he will sign his certificate is void. (*f*)

So, (*g*) a security given to a creditor of a bankrupt, in order to induce him to withdraw a petition which he had preferred to the Chancellor against the allowance of the certificate, is also void by the stat. 5 Geo. II. c. 30. s. 11.

6. *Of the Assignment of a Bankrupt's Estate to his Assignees; and of their Right to receive and discharge Debts and Prosecute Actions, &c.*

By the stats. 13 Eliz. c. 7. s. 11. and 1 Jac. 1. c. 15. the commissioners may assign all money, goods, chattels, merchandizes, wares, and debts due to the bankrupt from any person, and in what manner soever, and the assignment vests the property, as well present as future in the assignee, and the bankrupt shall not afterwards recover, release, or discharge the same, nor shall it be attached as a debt of the bankrupt's. (*b*)

But until assignment, the property remains in the bankrupt.

Thus, in the case of *Cary v. Crisp*, (*i*) which was an action of *indebitatus assumpsit*; the defendant pleaded, that the plaintiff became bankrupt, and that a commission was taken out, and therefore all his goods, &c. belonged to the commissioners, &c. The plaintiff demurred, and had judgment; for till an assignment, the property of the goods is not transferred out of the bankrupt.

One of several assignees of a bankrupt may receive the monies belonging to the estate, and give a valid discharge for the same.

Thus, in the case of *Smith and others v. Jameson and others*, (*k*) which was an action of *assumpsit* for money had and received. It

(*f*) *Vide Stat. 5 Geo. II. c. 30. s. 11. Jones v. Berkley, Doug. 695. n. 3. Smith v. Bromley, Ibid. 696. n. 3.*

(*g*) *Sumner v. Brady, and others, 1 H. Bl. 647.*

(*b*) *Vide Co. Bkpt. Laws, cap. 8. s. 10.*

(*i*) 1 *Salk.* 108. *See also Str. 981. S. P.* (*k*) 1 *Esp. Rep.* 114.

appeared that the defendants had been partners in trade: while they were in partnership one of them being assignee to a bankrupt estate had used part of the money belonging to that estate in the partnership trade, without the knowledge or acquiescence of the other assignees, who were the plaintiffs in the present action, but with the knowledge of his partner that the money was part of the bankrupt estate. In *December, 1792*, the partnership was dissolved, and the partner, who was the assignee, continued in the business, and received from the other money and effects sufficient to discharge all debts due by the partnership, including the money of the bankrupt estate, of which they had had the use.

It then became a question, whether this was a repayment to the partner who was assignee, and so should discharge the other.

Lord *Kenyon*, Ch. J., before whom the cause was tried, was of opinion, that one assignee of a bankrupt estate might receive the monies belonging to the estate, and give a legal and valid discharge for it.

By the stat. 5 Geo. II. c. 30. s. 38. the assignees are prohibited from commencing any suit in *equity*, without the consent of the major part in value of the creditors of the bankrupt, who shall be present at a meeting called for that purpose. (*l*)

So, they cannot submit matters to arbitration without the like consent. (*m*)

But they may bring *actions at law* without first calling a meeting of the creditors. (*n*)

If the same persons are assignees of two partners under a separate commission against each, they cannot, in one action, sue for a debt due to the two, and also for debts due to each individually. (*o*)

Where the assignees bring an action upon a contract made by the bankrupt *before his bankruptcy*, they must sue as assignees, and state themselves as such in the declaration; but if they sue upon a contract made after the bankruptcy, they need not sue in their representative character as assignees, but in their own right.

(*l*) See also *Co. Bkpt. Laws*, ch. 14. s. 1. (*m*) *Ibid.* 261.

(*n*) *Ibid.* ch. 14. s. 2. (*o*) Vide 3 *Term Rep.* 433. 779.

Thus,

Thus, in the case of *Evans* and others v. *Mann*, (p) where it appeared that the bankrupt some years after his bankruptcy, and before he had obtained a certificate, continued to carry on his trade as a lighterman, in buying and selling lighters; and, amongst others, sold a lighter to the defendant, who paid him 30*l.* part of the purchase money, at the time of the sale. Afterwards the plaintiffs, hearing of the sale, applied to the defendant, and insisted upon having the lighter delivered up to them, or the purchase money paid; but afterwards it was agreed between them, that the defendant should keep the lighter, and pay the residue of the purchase money to the plaintiffs; and for this the present action was brought. At the trial, the defendant's counsel objected that the action could not be maintained, because the plaintiff did not sue as assignee, nor state themselves as such in the declaration.

But Lord *Mansfield* over-ruled the objection. And afterwards, upon a rule for a new trial, his lordship said: "The lighter was the property of the assignees, and, consequently, the sale by the bankrupt was a contract as their agent by operation of law, and on their account. Therefore it was not necessary that they should state themselves to be assignees in the declaration: though in respect of the evidence in support of the action, it might be incumbent on them to prove the trading, bankruptcy, and so forth; in short, the whole of their case."

Willes, J. also thought, that the sale by the bankrupt could be considered in no other light than as agent or servant to the assignees.

Asbburß, J. said: "That in the case of an action at the suit of an executor, it is clear, if the action be brought on a contract made by himself, respecting the goods of the testator, he need not name himself executor. Therefore I should doubt whether, in this case, it would be necessary for the plaintiffs to go into evidence of the trading, bankruptcy, &c. For here there was an actual treaty between the plaintiffs and the defendant, relative to the matter in litigation, and not merely a promise by implication of law. And if so the action is founded on an actual contract between the plaintiffs and the defendant, consequently the plaintiffs

are entitled to recover *suo jure*. In which idea the court concurred : and refused the rule for a new trial.

If a bankrupt, before his bankruptcy, commence an action at law, such action does not abate, but the assignees should proceed in his name until after judgment, either interlocutory or final.

Thus, in the case of *Kretchman v. Beyer*, (q) in error, where the defendant, in error, having recovered a judgment against the plaintiff, in error, in the Court of *Common Pleas*, the latter brought a writ of error, which was duly issued, allowed, and served. Afterwards the defendant, in error, became a bankrupt, and his assignees sued out a *scire facias quare executionem non*, reciting the recovery below, and the writ of error.

Buller, J., "The *scire facias* is wrong either way. First, as a *scire facias quare executionem non*, because it appears from the recital, that a writ of error is depending; and, Secondly, as a *scire facias* to compel an assignment of errors, it is likewise wrong, even supposing it did not take notice of the writ of error depending; because there has been a proceeding since the judgment. And the rule is, that the assignees cannot make themselves parties to the record in any intermediate stage of the proceeding; but it must be immediately after judgment, though an interlocutory judgment is sufficient for that purpose. Here the assignees should have gone on with the writ of error in the bankrupt's name till judgment. Therefore the *scire facias* must be quashed.

7. *Of Payments, &c. made to or by a Bankrupt, When Protected.*

The legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commissioners to divest the property of the bankrupt by relation, which may go back to a great length of time, and avoid all acts done by the bankrupt, without regard to the fairness or fraud of them. So that a sale of goods by the bankrupt, after the act of bankruptcy committed, is a

(q) 1 *Term Rep.* 463. See also *Waugh v. Austen*, 3 *Term Rep.* 437.

note
443.

sale of the assignees' property, for which they may maintain *trover* or *assumpsit*.^{*} And it is the same as to the payment of money; but the rigour of this rule has been relaxed by the legislature. For by the stat. 1 Jac. 1. c. 15. s. 14. it is enacted, "That no debtor of the bankrupt be hereby endangered for the payment of his or their debt, truly and *bond fide*, to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt."

And by the stat. 19 Geo. II. c. 32. after reciting "Whereas many persons within the description of, and liable to the statutes concerning bankrupts, frequently commit secret acts of bankruptcy unknown to their creditors and other persons, with whom in the course of trade, they have dealings and transactions; and after the committing thereof, continue to appear publicly, and carry on their trade and dealings, by buying and selling of goods and merchandizes, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner, as if they were solvent persons, and had not become bankrupts: and whereas the permitting such secret acts of bankruptcy to avoid and defeat payment, really and *bond fide* made in the cases, and under the circumstances above-mentioned, where the persons receiving the same had not notice of, or were privy to such persons having committed any act of bankruptcy, will be a great discouragement to trade and commerce, and a prejudice to credit in general: it is enacted, that no person who is, or shall be really and *bond fide*, a creditor of any bankrupt, for or in respect of goods really and *bond fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange really and *bond fide* drawn, negotiated, or accepted by such bankrupt, in the usual or ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate, any money, which before the suing forth of such commission, was really and *bond fide*, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice, that he is become a bankrupt, or that he is in insolvent circumstances."

^{*} Vide *Co. Bkpt. Laws*, 571.

And by the statute 46 Geo. 3. c. 135., reciting "whereas great inconveniences and injustice have been occasioned by reason of the fair and honest dealings and transactions of and with traders being defeated by secret acts of bankruptcy, in cases not already provided for, or not sufficient^{ly} provided for by law : for remedy thereof, be it enacted, that in all cases of commissions of bankrupt hereafter to be issued, all conveyances, by all payments by and to, and all contracts and other dealings and transactions, by and with any bankrupt *bonâ fide* made or entered into, more than two calendar months before the date of such commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual, to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt had not at the time of such conveyance, payment, contract, dealing, or transaction, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment."

By section the second, it is further enacted, "that in all cases of commissions of bankrupt hereafter to be issued, all and every person and persons with whom the bankrupt shall have really and *bonâ fide* contracted any debt or debts before the date and suing forth of such commission, which, if contracted before any act of bankruptcy committed, might have been proved under such commission, shall, notwithstanding any prior act of bankruptcy may have been committed by the bankrupt, be admitted to prove such debt or debts, and to stand and be a creditor under such commission, to all intents and purposes whatever, in like manner as if no such prior act of bankruptcy had been committed by such bankrupt; provided such creditor or creditors had not, at the time of such debt or debts being contracted, any notice of any prior act of bankruptcy by such bankrupt committed."

By section the third, it is also enacted, "that in all cases in which, under commissions of bankrupt hereafter to be issued, it shall appear that there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit was given to, or the debt was contracted by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided such credit was given to the bank-

rupt two calendar months before the date and suing forth of such commission, and provided the person claiming the benefit of such set-off had not, at the time of giving such credit, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment: provided always, that the issuing of a commission of bankrupt against such bankrupt, although such commission shall afterwards be superseded, or the striking of a docket for the purpose of issuing a commission against such bankrupt, whether any commission shall have actually issued thereupon or not, shall be deemed notice of a prior act of bankruptcy for the purposes of this act, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission, or striking such docket."

By the 4th section it is enacted, "that all persons against whom any commission of bankrupt shall hereafter issue, and who shall be duly found bankrupt under the same, shall, upon obtaining his, her, or their certificate, be discharged of and from all debts by this act made proveable under such commission, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such secret acts of bankruptcy had not been committed prior to the contracting of such debts."

And by the last section of the act, it is enacted, "that no commission of bankrupt that shall be hereafter issued, shall be avoided or defeated by reason of any act of bankruptcy having been committed by the person, or any of the persons against whom such commission shall have issued, prior to the contracting the debt of the creditor, or any of the creditors, upon whose petition such commission shall have issued, if such petitioning creditor had not any notice of such act of bankruptcy at the time when the debt to him was contracted; but that such commission of bankrupt, and all the proceedings under the same, shall be valid and effectual, to all intents and purposes, notwithstanding that such prior act or acts of bankruptcy shall have been committed by such bankrupt."

Upon this latter statute no case has arisen in any of our courts; but on the two former acts the following determinations have been made:

In the case of *Wilkins* and another, assignees of *Cann*, a bankrupt, *v. Casey* (r), which was an action of *assumpsit*, as well for money had and received by the defendant, to and for the use of the plaintiffs, as assignees of *Thomas Cann*, after he became bankrupt, as also for the use of *Cann* before he became a bankrupt. On the trial of the cause a verdict was taken for the defendant, subject to the opinion of the Court of *King's Bench*, on the following case: "*Cann* was a clothier, and the defendant his factor in *London*; and their course of trade was this: *Cann* consigned goods to the defendant, which were sold by him, and he received 5 per cent. commission, taking on himself the risk of the debts. Goods to the amount of 222*l.* 18*s.* had, previous to the act of bankruptcy, been so consigned to the defendant, and sold by him; and he was indebted to *Cann* to that amount. On the 21st of *February*, 1794, *Cann* committed an act of bankruptcy, on which the commission issued, by leaving his dwelling-house at *Rodborough*, in the county of *Gloucester*, to which he never returned. On the 22d of *February* he arrived in *London*, and on the same day called on the defendant, at his own house, in the *Old Change*, and, after informing him that he wanted to pay for a quantity of wool which he had bargained for in the country, requested the defendant to furnish him with bills for the amount of the goods so sold by him, as factor, and for which the defendant then stood indebted. The defendant thereupon accepted bills of exchange, which *Cann* then drew, payable to his own order, at two, three, four, five, and six months after date, and indorsed in blank by him, to the amount of 208*l.* 12*s.* and also delivered to him one other bill, dated 22d of *February*, 1794, drawn by the defendant, and payable to one *Terry*, for 14*l.* 6*s.*, making together the sum of 222*l.* 12*s.* the whole balance due to *Cann* from the defendant, but for which no receipt or acknowledgment was given. "*These bills were discharged by the defendant as they became due.*"

The Court were of opinion that this payment was protected by the stat. 1 Jac. 1. c. 15. s. 14.

Lord *Kenyon*, Ch. J. said, "This is as clear a case as can be stated. If we had an election given us for the first time to put either a rigid or a liberal construction on the statute of *James*, I should not hesitate to say that we ought to put a liberal construction upon it; for the object of it was to protect certain payments

made to a bankrupt, that common sense and justice required should be deemed valid payments, and in this instance to correct the rigour of the bankrupt laws. Now if the defendant had given other goods in exchange for these at the time, that would have been a payment to all intents and purposes, though not made in monies numbered : and it has always been holden that giving a bill of exchange is deemed a payment in satisfaction, provided the bill be paid when due."

Upon the stat. 19 Geo. II. c. 32. it has been determined that where the holder of a bill of exchange gives time to the acceptor, on a promise to pay interest ; and, after a secret act of bankruptcy of the latter, the holder, without knowing of the bankruptcy, receives the amount of the bill, with interest, from the bankrupt, such payment is not protected by that statute.

Thus, in the case of *Vernon* and others, assignees of *Tyler*, a bankrupt, *v. Hall*, (s), which was an action brought by the assignees, to recover 570*l.* paid by the bankrupt to the defendant, after the bankruptcy. The act of bankruptcy was proved on the 2d of *May*, 1785 ; but it was unknown to the defendant, as well as to several of her other creditors at that time. Two months prior to the bankruptcy, the defendant sold an estate to one *Uterson*, who, in order to pay for it, had drawn a bill of exchange to that amount on the bankrupt, in favour of the defendant, payable the 7th of *February*, in the same year. When it became due, the defendant applied for it, and was told that it was not convenient at that time to pay ; but if he would permit it to remain in the bankrupt's hands, she would allow him interest on it. To this he assented, and on the 22d of *May*, 1785, applied for payment, which he received, without knowing of the bankruptcy.

It was contended that the payment of the bill was made in the ordinary course of business, and was therefore protected by the stat. 19 Geo. 2. c. 32.

But the Court were clearly of opinion that it was not such a payment, in the ordinary course of business, as came within the provision of that statute ; for they considered the transaction as a loan of money at interest, which became a debt.

So, in the case of *Bradley* and another, assignees of *T. Bradley*, a bankrupt, v. *Clark* (t), which was also an action of *assumpsit* for money had and received. The facts were these: *T. Bradley* being indebted to the defendant, as a common carrier, in the sum of 44*l.* for carriage of goods belonging to *T. Bradley*, and in which he dealt in the way of his trade, the defendant, on the 24th of *November*, 1791, caused *T. Bradley* to be arrested for such debt, who thereupon paid the same to the defendant, the defendant not then knowing that *T. Bradley* had committed any act of bankruptcy, or was in insolvent circumstances. An act of bankruptcy had, however, been committed by *T. Bradley*, on the 17th of *November*, 1791, and a commission of bankrupt was thereupon afterwards issued against him on the 23d of *December* following: and it did not appear that he had carried on any trade after he had committed the said act of bankruptcy.

The Court determined that this case did not fall within the stat. 19 Geo. II. c. 32. and therefore judgment was given for the plaintiffs.

Lord *Kenyon*, Ch. J. said, "In this case we are called upon to put a construction on the statute 19 Geo. II., and as it is a remedial law, I think we should give effect to it as far as the words of the act warrant. But it is clear that the legislature did not mean to extend this remedy to all cases: had such been their intention, they would have said so in express terms; instead of which they have chosen to use particular words, and to confine the remedy to particular cases. The statute only extends to two cases; of which this is neither. Whether or not it would have been wise to have extended this provision to all cases, I will not presume to determine, though I cannot refrain from observing that had that been the case, all the property of a bankrupt might be conveyed to one creditor, to the exclusion of the rest. In determining on this act of parliament, it is sufficient to say that this case is not within the words, nor (as far as I can collect,) the intention of the act; though had it clearly and indisputably appeared to have come within the meaning of the act, I should have been inclined to have extended it to this case."

Buller, J. said, "On this statute the case of *Vernon v. Hall* (u), is decisive. There the bill of exchange had been drawn on the

(t) 5 Term Rep. 197. (u) Ante 438.

bankrupt, who, when it became due, requested time of the holder (the defendant), saying, it was not convenient to her to pay it at that time, but promising to pay interest for it, if he would permit it to remain in her hands; and after, and without knowing of the bankruptcy, the defendant received the amount of it: but though the debt continued due under the bill, the Court said it was not a case within the statute; for when the defendant agreed to let the money remain at interest, it became a loan of so much to the bankrupt. Now that is a much stronger case than the present; because there the debt originally arose on a bill of exchange in the course of trade. With regard to the construction of statutes, according to the intention of the legislature, we must remember that there is an essential difference between the expounding of modern and ancient acts of parliament. In early times the legislature used (and I believe it was a wise course to take), to pass laws in general and in few terms: they were left to the courts of law to be construed so as to reach all the cases within the mischief to be remedied. But in modern times great care has been taken to mention the particular cases in the contemplation of the legislature, and therefore the courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes."

So, in the case of *Pinkerton* and others, assignees of *Gale*, a bankrupt, v. *Marshall* (u), which was also an action of *assumpsit*, for money had and received to the use of the plaintiffs, as assignees of *Gale*; and the circumstances were as follow: At the sittings after Hilary term, 1793, *Marshall*, who was a ship-owner, recovered a verdict against *Gale*, who was a merchant, in an action on a charter-party, for 428*l.* 11*s.* 11*d.* Early in the month of *April*, in the same year, *Gale* committed an act of bankruptcy; afterwards, *Marshall* having had no notice of the bankruptcy, was requested by *Gale* to give him time for the payment of the sum recovered by the verdict, instead of immediately entering up judgment, and taking out execution. To this *Marshall* consented, on receiving a bill of exchange, drawn by *Gale*, in his favour, on one *Younghusband*, who was a debtor of *Gale's* for that sum, at four months after date, and on payment of the costs to the attorney. When the bill became due, it was paid by *Younghusband*,

by another bill drawn on Sir *James Esdaile* and Co., the amount of which, together with the costs, this action was brought to recover.

The Court held, that this payment was not protected by the stat. 19 Geo. II. c. 32. They said the authorities of *Vernon v. Hall* (w) and *Bradley v. Clark* (x) were decisive of the point in dispute, particularly the former, where, as well as in this instance, a personal credit was given to the bankrupt; that if the payment by the bankrupt, in those cases, could not be supported, neither could it be in the present.

So, (y) where a trader, subsequent to an act of bankruptcy, being arrested and detained in prison at the suit of several creditors, sent for all his creditors but one, and paid their debts in full: but no other circumstance occurred from which it could be presumed that they knew of his bankruptcy, or insolvency: it was determined that such payments were not protected by the 19 Geo. II. c. 32.

But it has been decided that payment of a bill of exchange to a creditor under an arrest, after a secret act of bankruptcy, is protected by the above statute.

Thus, in the case of *Cox* and others, assignees of *Emmott* a bankrupt v. *Morgan*, (z) which was an action of *assumpsit* for money had and received to the use of the plaintiffs. The commission was dated the 14th of *August*, 1799. The act of bankruptcy was the lying in prison hereafter stated. *Emmott* was arrested at the suit of one *Dixon* on the 31st of *October*, 1798, and committed to the *Fleet* on that arrest on the 6th of *November*. He remained in the *Fleet*, on that account, till the 16th of *February*, 1799, when he was discharged. *Emmott* had a partner named *Bray*, who was abroad before he went to the *Fleet*; the partnership was indebted to *Morgan*, the defendant, in the sum of 44*l.* 13*s.* 9*d.* on a bill of exchange accepted by *Emmott* and *Bray*, on the partnership account. The bill not being paid, *Morgan* proceeded by original against *Emmott* and *Bray*, for the purpose of outlawing *Bray*, on the 14th of *November*, 1798, and em-

(w) *Ante* 438. (x) *Ante* 439. (y) *Southey and another v. Butler*, 3 *Bos. & Pul.* 237.

(z) 2 *Bos. & Pul.* 398. See also *Holmes v. Wennington*, 2 *Bos. & Pul.* 399. n. a. S. P. Sed Vide 7 *East Rep.* 160.

officer employed a sheriff's officer to arrest *Emmott*, who could not find him. An *alias* was taken out, and the sheriff's officers went to his house, and was told he was in the country. He afterwards met with him at his house, and arrested him at the suit of *Morgan*, on 23d of *February*, 1799. He told the officer he was just returned from *Portsmouth*. *Emmott* immediately paid *Morgan's* attorney the 44*l.* 13*s.* 9*d.* and 1*l.* 5*s.* for interest which was paid over to *Morgan*. Neither *Morgan*, nor any one concerned for him personally knew that *Emmott* had been in the *Fleet*, had committed an act of bankruptcy, or that he was in insolvent circumstances.

follows The Judges, (a) not being unanimous, delivered their opinions *seriatim* as follow :

Chambre, J. "The only question in this case is, whether the payment of the money for which the action is brought, and which was made by the bankrupt to the defendant after an act of bankruptcy, and under the circumstances stated in the case, is a payment protected by the stat. 19 Geo. II. c. 32. s. 1. or not? I am of opinion, that the payment is not protected by the statute. I should have given this opinion with much more satisfaction to myself if it had been fortified by those of the rest of the court; but I stand single in my opinion here, both my brothers thinking differently from me upon the subject, and I am also opposed by the authority of a determination of the Court of *Enchequer*, which (though there are material circumstances in the present case which did not occur in that) is a case in point, as to the general question of a payment under an arrest being protected by the statute. That decision too is strengthened by, and, in a considerable degree, founded upon a determination of Lord *Loughborough* at *Nisi Prius*, which I learn from my brother *Heath*, was confirmed in this court. I find from some notes, I have procured of what was said by the court at *Nisi Prius*, that a writ, in that case, had been sued out, but whether the party was arrested I do not know. I suppose he was. I am sensible of the weight of these authorities, and of the respect that is due to them, though there are distinguishing circumstances in the present case, but if it was right to extend the act so far as is done in those cases I do not

(a) *Heath, Rooke, and Chambre. Lord Eldon was not in court during the argument, and therefore did not deliver any opinion upon the case.*

know what distinction is to be relied on; I feel myself therefore under the necessity of inquiring into the foundation of those decisions. I do it with the utmost distrust of my own judgment, but if I find no ambiguity in the act, and think (however erroneously) that the act has not been expounded but contradicted, I feel it my duty to adhere to the authority of the statute.

Before the passing of this act I take the law to have been clearly settled, and so the act itself supposes, that when an act of bankruptcy had been committed, and a commission issued in consequence of it, the property of the bankrupt was by relation so vested in the assignees, that any disposition of it by the bankrupt, after the act of bankruptcy was void as against the creditors however fairly such disposition was made, and without any regard to its being a voluntary or compulsory payment. Payments to a bankrupt stand upon a very different footing; and with reason. Even after notice of the act of bankruptcy the payment may be good, if made under legal compulsion, for an act of bankruptcy is no defence against the action of the person who commits it, unless a commission is taken out against him, and it is not the fault of the bankrupt's debtor if the delay of the creditors in suing out the commission deprives him of his defence; he ought not to increase the fund by paying his debt twice over. But compulsion against the bankrupt, however it may operate in protecting payments before the act of bankruptcy, while the property is in the bankrupt himself, (and which it does by excluding the imputation of fraud,) can have no effect in protecting payments after the act of bankruptcy. The bankrupt himself does not suffer by the compulsion, and the compelling creditor has only to refuse what he ought not to have taken, and come in for his share, in common with the other creditors. The question therefore must turn upon the operation of the statute, and we are only to see whether the payment on which the present question arises is there described. The recital of the statute is not immaterial, it states the frequent commission of secret acts of bankruptcy unknown to creditors, and others with whom the bankrupts have dealings in trade, and their continuing afterwards to appear publicly, and carry on their trade and dealing, by buying and selling, drawing, accepting, and negotiating bills, and paying and receiving money on account thereof in the usual way of trade, and in the same open and public manner as if they were solvent persons. It then recites the discouragement to trade, and prejudice

dice to credit, from permitting payments to be defeated in the cases, and under the circumstances above-mentioned; and enacts that no person, who is or shall be really and *bonâ fide* a creditor of any bankrupt for or in respect of goods really and *bonâ fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange really and *bonâ fide* drawn, negotiated or accepted by such bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate, any money which before the suing forth such commission was really and *bonâ fide*, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt, before such time as the person receiving the same, shall know, understand or have notice that he is become a bankrupt, and that he is in insolvent circumstances. The nature of the debt in the case before the court is not denied to be such as the statute describes, but is the mode of payment such as the statute requires? The debt has been really paid. It is stated (and so we must take the fact to be, though I think the circumstances would have warranted a contrary conclusion) to have been paid without the defendant's knowledge of bankruptcy or insolvency; but that is not all that the statute requires. It is further required, to be the usual and ordinary course of trade and dealing, and on those words the question, or, at least, my difficulty arises. I have endeavoured to obtain an account of the two authorities wherein a payment under an arrest has been held to be protected, and to my great disappointment I find little or no argument applied to the very important words I have last alluded to, but a good deal to a circumstance on which the statute is totally silent, namely, a compulsive payment, which was undoubtedly bad before the act. In the case at *Nisi Prius*, the question is considered as a question of notice of insolvency, and what is presumptive evidence of such notice, or of collusive payments and preferences. It is said, that a knowledge of the debtor's being poor, or in failing circumstances would not vitiate the payment, and that compulsive payments were meant by the act to be protected. They are protected before the act of bankruptcy, but the act of Parliament, I think, has no view whatever to compulsive payments, either before or subsequent to the act of bankruptcy. The argument of the Court of *Exchequer*, though expressing great doubts on the subject, disposes of the language of the act, on which the question arises, in a way that would

solve every difficulty in every case; it cuts the knot at once. It is said to be easy to ascertain what is a debt contracted in the course of trade, and therefore the decision in *Vernon v. Hall* (b) is approved of, but as to payments in the usual and ordinary course of trade and dealing, it is said to be difficult to draw the line. Then an inaccurate definition of such payments, supposed to have been used in argument by the counsel, is controverted, and we hear no more of those words, or of any construction of them, they are in effect expunged from the statute, and what follows amounts only to this, that the circumstance of an arrest, can only be used as evidence to be left to a jury, of notice of insolvency, and that if not evidence of such notice it is nothing but diligence to get payment, a means to quicken the payment, which ought not to defeat it, and that it is sufficient that there is no improper motive on either side. As to the difficulty of defining what are payments in the usual and ordinary course of trade and dealing, without feeling much of that difficulty it may be sufficient for me to say, that it is not necessary in deciding one case upon an act of Parliament to decide all the cases that may possibly happen, and that if, in the case before us, we can say, that the payment was not in the usual and ordinary course of trade and dealing, we have no occasion to go further; I have no difficulty in saying, that I admit that diligence in procuring payment of a debt, used in the common and ordinary way, would not of itself defeat a payment; I have as little difficulty in saying, that it is no part of the purview of the act to afford particular protection to diligence or activity in recovering debts; on the contrary, the intention is manifestly to protect only those who are deluded by specious appearances of solvency and credit; and though it be true that improper motives or knowledge of insolvency may vitiate payments otherwise good, yet purity of motives alone, without the concurrence of the other circumstances required by the statute, will not give validity to such payments, made after the act of bankruptcy. The intention of the act is not generally to authorize creditors to retain what they had received without knowledge of insolvency: it is to place creditors of a particular description, and under particular circumstances in a better situation than the general mass of creditors. That being the object of the act, it was necessary, in order to prevent litigation, and the extension of the

(b) *Ante* 438.

act to persons not intended to receive the benefit of this preference, to describe with precision the condition of those who were to have the preference; the legislature have done it with guarded attention, by using as definite and restrictive language as could well be found to answer that purpose. To prevent the effect of any ambiguity in the meaning of the word 'usual' they add the word 'ordinary.' The payment must not only be in that case of trade and dealing which is usual, but it must be that which is in the ordinary use. The propriety of confining the act to its declared objects is distinctly stated by Lord *Kenson*, in the case of *Bradly v. Clarke*. (c) The case of *Vernon v. Hall* (d) (if cases were necessary) appears to me a strong authority, that the act ought not to be extended in construction. If it be said that that case applies only to the nature of the debt, which was held to be turned into a loan, I answer, that the words of that part of the clause which describes the nature of the debt, as to the course of the trade, are exactly the same with those which relate to the mode of payment; the debt there having been also contracted as described in the act, the decision may properly refer to the mode of payment; but whether it does or not, the case proves, that the act ceases to operate when circumstances, not referable to a trading, are introduced. As a remedial act I am ready to give it every extension by construction that remedial acts are entitled to, but no principle applying to the construction of remedial acts authorises the extension of them contrary to the intention of the legislature. It may also be remarked, that all the other bankrupt laws are remedial; that this particular act trenches upon the great leading principle of the bankrupt laws, that of securing the property for equal distribution, by giving a preference to a particular class of creditors; and therefore is not peculiarly entitled to have its operation extended by construction. It is time to resort to the facts of the case, and see how far they answer the description contained in the act. When the bankrupt had been publicly and openly carrying on his business, we nowhere learn, we have no act of trading stated, but the acceptance of the bill as a partner with another person. After that he is arrested for debt, goes to goal, and lies there near four months. After that act of bankruptcy it is not in evidence that he ever appeared publicly, and carried on his trade and dealing in the usual way of trade, and in the same

(c) *Ante* 439.(d) *Ante* 438.

open and public manner as if he was a solvent person, all which circumstances are by the preamble supposed to attach themselves to the situation of the bankrupt, whose payments were meant to be ratified by this act; on the contrary, he was arrested by the defendant within a week after his discharge, having, according to his own account, gone off to *Portsmouth* in the meantime. Was the defendant deluded by any specious appearances of solvency at the time of the payment? He had sued out an original against the two partners very soon after the bankrupt went to prison. The other partner was gone out of the kingdom. The defendant could not be found by the officer; an *alias* became necessary; he is met with accidentally, not having been found at his own house, and arrested; to deliver himself from that arrest he makes the payment. Can we say this is a payment made by a person carrying on his business as a solvent man, in an open and public manner, or which comes more directly to the enactment of the statute; was this a payment in the usual and ordinary course of trade and dealing? Are sheriff's bailiffs, the persons who transact the affairs of merchants and traders in the ordinary course of trade and dealing? If this will do where are we to stop? This is a case where payment has been made under an arrest, but why stop there? will not the argument go equally to protect payments after suing out execution? If, indeed, the sheriff seizes and sells the effect, that may not be considered as a payment by the party, but I can find no difference between the present case, and cases where the bankrupt pays the money to prevent the seizure, or to redeem the goods after seizure, or even to redeem his person after he is taken upon the *ca. sa.*: and payments under all these circumstances we are desired to consider, as made under appearances of perfect solvency on the part of the bankrupt, and in the ordinary course of trade. I feel the weight of the authorities against the opinion I am delivering, and I am fully aware of the propriety of adhering to former decisions, and the mischief of lightly departing from them; but I am in some degree relieved from their pressure by these considerations, that the attainment of certainty is the chief reason for submitting to the authority of such determinations, as are not perfectly satisfactory in respect of the arguments on which they were founded, and that in my view of the case before us, certainty will be better attained by bringing back our attention to the language and meaning of the act of Parliament, which is to be the rule of our conduct, than by following

following the determinations; to what uncertainty they lead we have an instance in the late attempt in the Court of *King's Bench*, to bring payments to carriers for the carriage of goods within the protection of the statute, which I can only attribute to the great latitude of construction used in the former cases. On these grounds I feel myself bound to give my opinion, that the payment in question is not supported by the stat. 19 Geo. II., and that the plaintiffs, the assignees, are entitled to recover."

Rooke, J. "In this case, a bill drawn *bonâ fide*, and in the ordinary course of trade has been paid after an act of bankruptcy, immediately upon the bankrupt's being arrested, and neither the creditor, nor any one concerned for him, knew that the bankrupt had committed an act of bankruptcy, or was in insolvent circumstances. The question is, whether this payment being immediately upon an arrest is a payment in the ordinary course of dealing? or whether being a payment by legal compulsion, it is not out of such ordinary course? In deciding this question, I think, I ought to look to the effect of using legal diligence in other cases respecting bankruptcy, and to see in what light courts of law have considered it. The statute 1 Jac. 1. c. 15. s. 14 provides, that no debtor of a bankrupt be hereby endangered for the payment of his debt truly and *bonâ fide* to any bankrupt before such time as he shall understand or know that he is become bankrupt. The strict construction of this statute would be, that if he did understand or know it, his payment should be endangered: but courts of law have held, that if a creditor has notice of a bankruptcy, and pays under legal coercion he shall be protected. See 3 *Keble* 231. *Freeman* 349. *S. C.* 2 *Term Rep.* 479. Here then a payment by legal compulsion is supported, even against the obvious construction of the statute, and hence, I conclude, that in cases of bankruptcy, payments by compulsion of law are favoured and protected. The words of the statute 19 Geo. II. are very different from those of 1 Jac. 1.; but they do not expressly avoid payment by legal coercion, nor exclude them from protection; and if excluded, they must be excluded by implication only; and such implication if applied to the whole clause on which this question arises will go a great way, indeed, to invalidate *bonâ fide* payments to honest creditors. The statute 19 Geo. II., so far as respects bills, requires that they be drawn, negotiated, or accepted really and *bonâ fide*, and in the usual
and

and ordinary course of trade and dealing. Now if an arrest so far changes the ordinary course of trade and dealing, as to affect the payment of a bill, it will equally affect the drawing, the negotiating, or the accepting it. The consequence will be, that if a debtor having committed a secret act of bankruptcy is arrested and gives or accepts a bill payable at a future day, and actually pays it, and then a commission issues, the assignees may recover back the money. This will be a very dangerous construction, and will render all transactions under an arrest very precarious. It has been suggested, that payment under arrest is not to be favoured, because the arrest is a circumstance which should raise a suspicion of insolvency. If so, by the same reasoning, payment under a threat of arrest will be equally suspicious; for whether a man pays before the bailiff arrests him or after, if he pays under terror of a goal, he pays under compulsion; and the compulsion in either case may with equal reason raise a suspicion of insolvency. If a threat to arrest does not alter the nature of a payment, and take it out of the ordinary course of dealing (and it has not been contended in argument that it does) it will be difficult to assign any sound reason why an actual arrest should do so. There are stages in the proceedings between the threat and the actual arrest which are as much out of the ordinary course of dealing as the arrest itself; and what line shall we draw by our discretionary construction where the legislature has drawn none? Shall we inquire, is the writ purchased? is it delivered to the bailiff? is the bailiff in the house? has he seized the debtor? or is he only in the act of doing it? When is it that the ordinary course ceases, and the extraordinary begins? As the words 'usual and ordinary course of trade and dealing' do not necessarily exclude transactions, either by menace, or by compulsion of legal process, I am not disposed to extend them to either case; they are general words, and they may be intended to apply to the case of undue preference: for a man may be disposed to pay a debt really and *bona fide* due, from a desire to favour a particular creditor, and may go out of the ordinary course of trade and dealing to do so. Payments under legal compulsion having been favourably considered by our courts in the construction of 1 Jac. 1., I think they ought to be as favourably considered in the construction of 19 Geo. II. which is in *pari materia*. Legal coercion is a course which the law allows, and surely if we attend to the literal construction of the statute, it is neither unusual nor extraordinary,

nor out of the ordinary course of dealing for a creditor to be driven to arrest his debtor, or to use legal diligence in order to procure payment. The taking out legal process does not depend so much on the real credit of the debtor, as on the patience or impatience of the creditor. If a creditor is obliged to call three or four times on a debtor before he can obtain payment, it may awaken suspicion. If a patient creditor does this, and receives payment, he is protected. Shall we say that if a harsh creditor calls once, and then arrests and is paid, he shall refund? Shall we consider his severity as a proof of his debtor's insolvency? The statute has given one positive criterion, viz., knowledge of the bankruptcy or insolvency; and has also required that the transaction shall be in the ordinary course of trade and dealing; but as it has not defined what that ordinary course must be, the courts of law must, as cases arise, declare what is within the ordinary course, and what is not. I have now given my reason why, upon general principles, I think that arrest or legal diligence is not within the restriction of the statute; but if it were a doubtful point how the statute should be construed, I must consider myself as bound by the construction it has already received in two courts in *Westminster Hall*. The case of the assignees of *Jones v. Lingard* was tried before Lord Loughborough, and afterwards was heard in this court on a motion for a new trial. There the creditor brought an officer with the writ into the shop, and then the debt was paid, and the payment was held to be good. The case of *Holmes v. Wennington*, (c) was decided on solemn argument in the Court of *Exchequer*. These cases have been cited in the Court of *King's Bench*, in the case of *Bradley v. Clarke*; and no doubt was hinted in that court as to the propriety of the decisions; yet Lord Kenyon particularly notes, how right it is to adhere to the words of the statute. We are also informed, that the late Mr. Justice Buller ruled the same point on the *Northern Circuit*, and that no application was made for a new trial. For these reasons, I think the verdict should be entered for the defendant."

Heath, J. "The question is, whether a payment by a tradesman, who has committed a secret act of bankruptcy, to a creditor who has arrested him, and who has no knowledge of the act of bankruptcy, or of the insolvency of his debtor, be good within the statute of 19 Geo. II.?"

(c) 2 Bos. & Pul. 399. n. a.

Before that statute, it was the policy of the bankrupt laws, in all cases, to deprive the bankrupt, by relation to his act of bankruptcy, of the power of disposing of his effects. In order to avoid the inconveniences arising from too rigid an observance of this principle, the act in question was made. It has always been considered as a remedial statute, and, as such, is entitled to a liberal construction. In order to give validity to the payment of a bill of exchange, it must be drawn and the money received in the ordinary course of trade. In my apprehension this bill had both requisites. Of the consideration of the bill there is no question. The bill was due before it was paid, and it was not officiously paid by the bankrupt. The objection is, that the payment was made under the terror of an arrest. If the bill had been paid before it became due, or if the bankrupt had solicited the defendant to receive the money, those circumstances would have vitiated the transaction, and would have brought the case within the statute. It is objected that the payment is under an arrest. If this were to be the ground of the decision, it would introduce great uncertainty: for if an arrest will vitiate a payment, why not a menace? and if a menace, why not a promise of some collateral advantage? There are two principles on which I shall found my judgment: the first is the general policy of the law, that the using of legal diligence is always favoured, and shall never turn to the disadvantage of the creditor. The maxim *vigilantibus et non dormientibus succurrunt jura*, is one of those that we learn on our earliest attendance in *Westminster Hall*. The second principle is, that this statute shall receive a construction agreeable to the general policy of the bankrupt laws, namely, that it shall not be in the power of the bankrupt to dispose of his effects, after his bankruptcy, in such a way as to give a preference to a favourite creditor. Now if payment under an arrest, though otherwise in a due course of trade, were to be held bad, the consequence might be, that if in the same day, or at the same instant, two creditors should apply for payment of their respective demands, the bankrupt might make a good voluntary payment to one creditor, and refuse payment to the other till there had been some menace, or actual arrest made, to vitiate the payment. I can see no inconvenience from this construction. If it be said that the creditors under an arrest might sweep away all the effects of the bankrupt; so may the favoured creditor under a voluntary payment; and the latter mischief is the most to be apprehended. Therefore I am of

opinion, as well upon the general policy of the law that favours the legal diligence of creditors, as on the particular policy of the bankrupt laws, that this is a good payment, and protected by the statute of 19 Geo. II. If the case were doubtful, the decisions ought to put an end to the controversy. I allude to the cases of *Calvert v. Lingard*, in this court, and of *Holmes v. Wennington*. I cannot pass over in silence the opinion and decision of the late Mr. Justice *Buller*, whose judgment will always have the greatest weight with me. The question is, whether this be a doubtful case? A case may not be the less doubtful because I entertain no doubt on the subject; but that is doubtful concerning which learned men differ. For these reasons I am of opinion that the plaintiff is not entitled to recover, and that a verdict should be entered for the defendant."

But payment of a debt by a garnishee, out of the bankrupt's estate, under a judgment of the *Mayor's Court*, in *London*, on a foreign attachment, is not protected by the stat. 19 Geo. II. c. 32. s. 1. and the assignees of such bankrupt, under a *third* commission issued against him, may sue for and recover back the money so paid, although the bankrupt, who had obtained his certificate under two former commissions, had not paid 15s. in the pound under the *second*; in which case his future effects remain liable to that extent to his creditors under the second commission.

Thus, in the case of *Hovil* and others, assignees of *Wardell*, a bankrupt, *v. Browning*, (f) which was an action of *assumpsit* for money had and received, a verdict was found for the plaintiffs for 367l. 16s. 6d., subject to the opinion of the Court of *King's Bench*, on the following case, which stated, "That in *November*, 1802, *Wardell*, being a trader, became indebted to the defendant in 367l. for goods sold and delivered, and, on the 27th of *January*, 1803, set sail in a ship, of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of bankruptcy. In *July*, 1803, insurances to the amount of 3400l. were effected for the bankrupt by Mr. *De Beaume*, a policy broker residing in *London*; and in the same month the ship and cargo were captured by the *French*. On the 20th of *January*, 1804, the defendant brought an action in the

(f) 7 *Engl. Rep.* 154.

Mayor's Court of London against the bankrupt, and attached 367*l.* in monies numbered in the hands of *De Beaume*, who had received the amount of the policies of insurance from the underwriters; and the defendant having, on the 28th of the same month, obtained a regular judgment by default in that action, received 367*l.* in that action from *De Beaume*. The bankrupt returned to *England* in *February*, 1804; and on the 9th *March* following a commission of bankrupt was issued against him, under which the plaintiffs were chosen assignees, and an assignment to them was regularly executed. *De Beaume* retained from the plaintiffs, as such assignees, out of the monies he had collected on the policies, the amount of the payment he had made to the defendant. *Wardell* had been a bankrupt twice before, (*viz.*) once in the year 1786, and again in the year 1788; and had obtained his certificate under those commissions, but had not paid a dividend of 15*s.* in the pound under the last of them; and his creditors at that time still remained unsatisfied. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover?

The Court were of opinion, first, that this was not a payment protected by the statute; and, secondly, that the future estate of the bankrupt only remained liable to the claims of his individual creditors under the *second commission*, not having received 15*s.* in the pound, which they might respectively sue for as in other cases; but that it could not prevent the vesting of the bankrupt's estate in the assignees under a third commission, for the benefit of all the creditors.

Lord *Ellenborough*, Ch. J. said, "I think that this was not a payment by the bankrupt; for the words of the statute are, "that no creditor shall be liable to refund to the assignees any money which, before the issuing of the commission, was really and *bonâ fide*, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt, before such time," &c. If it had been necessary to have decided the question on which the Court of *Common Pleas* were divided in opinion, in the case of *Con v. Morgan*, (g) I should have wished to have taken more time

(g) *Ante* 441.

to consider it, especially as the opinion of the majority of that Court is fortified by antecedent cases; though I confess that, at first sight of the statute, I should be more inclined to the construction put upon it by the single Judge. But there is no necessity for us to determine whether that case were rightly decided by the majority; for whether or not money received by a creditor, under the compulsion of process, can or cannot be said to be received by him in the usual and ordinary course of trade and dealing; at least, it must be received of the bankrupt to bring the case within the statute; the payment must be made by the bankrupt, or if not by his individual hand, at least by some agent of his, acting by his authority. But how can a payment extorted by compulsion of legal process, from one who happened to have effects of the bankrupt in his hands at the time, be said to be a payment by the bankrupt, who was not even conscious of the fact? Therefore, without going more at large into the question, it is sufficient to dispose of this case by saying, that it neither comes within the words nor the meaning of the statute."

Lawrence, J. "This cannot be said to be a payment by the bankrupt, even under the compulsion of process; for the bankrupt could not even know that the money belonging to him was in the hands of the person at the time by whom the payment was in fact made."

Le Blanc, J. "This is very different from cases of payments made by a person entrusted by the bankrupt with the disposition of his property, or by his direction, which may be considered as payments made by him in the usual and ordinary course of trade and dealing. But it is very difficult to say that a payment made by a third person without the knowledge of the bankrupt, without his even knowing that his property was in the hand of such third person, is a payment in the usual ordinary course of trade and dealing by the bankrupt himself."

8. *In what Cases an Action of Assumpsit will lie at the Suit of the Assignees for Money, or Goods received of a Bankrupt, either in Contemplation of, or after an Act of Bankruptcy.*

If money or goods be paid or delivered over by a bankrupt to a creditor, not in the ordinary course of trade, but in contemplation of, or after an act of bankruptcy, and with a view to favour that particular creditor, in preference to the other creditors, the assignees may recover back such money, or goods, so paid or delivered.

Thus, in the case of *Linton*, assignee, v. *Bartlet*, (b) where a trader, in consideration of a loan of 120*l.* without interest, being in insolvent circumstances, assigned one-third part of all his effects to the lender, who was his brother; and within two days after the making the deed, the trader absconded, and a commission was sued out against him, whereupon he was declared a bankrupt.

Per Curiam. “Although this may be a hard case, upon the brother, who is a *bona fide* creditor, yet the giving him the preference is a fraud upon all the laws concerning bankrupts, which proceed upon equality, and say that all the creditors shall come in *pari passu*. There is no case where ever such a preference as this was allowed. The same spirit of equality ought to warm the courts of justice which warmed the legislature when they made the bankrupt laws; and if we should let this deed stand, we should tear up the whole bankrupt laws by the roots; it is a bill of sale made by a trader, at a time when he was insolvent, and (plainly) had an act of bankruptcy in contemplation; it is partial and un-

(b) 3 *Wils.* 47. *In this and some of the following cases, the reader will observe that the form of action is trover. But as the assignees may elect to declare in assumpsit, or trover, for the same cause, where money has been actually paid, or goods sold, &c. the cases in both forms of action equally apply to the present subject. It should, however, be observed, that in the case of goods delivered, if the assignees elect to bring assumpsit for goods sold and delivered, instead of trover, they thereby affirm the contract, and the creditor may set off his debt against the demand of the assignees. See the case of Smith and others v. Hodison, 4 Term Rep. 211.*

just to all the other creditors."—Judgment was therefore given for the plaintiff and the deed was declared to be void.

So, in the case of *Alderson* and others, assignees, *v. Temple*, (i) which was also an action of *trover* for a promissory note, brought by the plaintiffs, as assignees of *Charles La Roche* and *Robert Willing*, bankrupts. The facts were these: The bankrupts *La Roche* and *Willing*, on *Friday 7th of November, 1766*, indorsed the note in question to the defendant *Temple*, to whom they were indebted to a large amount; and sent it in a letter directed to him at *Trowbridge*; which letter was carried to the post-house that morning, the bankrupts thinking that the post-day for *Trowbridge*. The letter, by the course of the post (which went out on the *Saturday night*) was received by the defendant some time on *Monday the 10th*, and could not be so before. The note in question was,

"*London, 10th October, 1766. Two months after date we promise to pay Messieurs La Roche and Willing, or order, six hundred pounds, for value received,*

"*Bryer and Everard.*"

The bankrupts had given *Bryer* and *Everard* two notes for 300*l.* each; which had not been discharged. *La Roche* and *Willing* committed acts of bankruptcy on *Saturday the 8th*; and the said note was so indorsed, and sent to the defendant, in contemplation of their insolvency and subsequent failure

The Court held, that the indorsing and sending the note, under the circumstances stated, were fraudulent as against the other creditors, and particularly Messrs. *Bryer* and *Everard*.

Lord *Mansfield*, Ch. J. said, "It is material to observe a great deal that is not stated in this case. First, there never was any course of dealing between the bankrupt and the defendants by way of indorsing, or sending notes to each other. The next thing is, that the letter, in which the note was sent, is suppressed by the defendant. It is not found, 'that the note was indorsed in payment of any debt;' it is only said, 'he was a creditor to a large amount.' It is not said whether it was to be received at the risk of *Temple*, or only as agent of the bankrupts; but the letter, which was in the power of the defendant, was not produced; and so the case

(i) 4 *Bur.* 2235. 1 *Bl. Rep.* 660. *S. C.*

stands without any appropriation of the note. The case is silent in these particulars ; and very materially so.

It is found that *Bryer* and *Euerard* were creditors of the bankrupts to just the same amount, for two other notes they had taken in exchange ; and that those two notes were not discharged. The only question I make is, whether, under the circumstances of this case, the indorsing and sending this note to the defendant is fraudulent and void, as such ? and I choose to put the case on that ground ; because the most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, to do substantial justice : and therefore I will avoid laying the stress that might properly be laid upon the assent being necessary to complete the contract, or the want of a delivery ; the solid ground of which is, that a contract shall be presumed complete upon any distinction where the justice of the case requires it, though there is no actual delivery. And it is settled that if a man sends bills of exchange, or consigns a cargo, and the person to whom he sends them has paid the value before ; though he did not know of the sending them at that time, the sending of them to the carrier will be sufficient to prevent the assignees from taking these goods back, in case of an intervening act of bankruptcy. But if goods or bills of exchange are sent, and the consideration has not been received, the court of *Chancery* always interposes ; and there are numbers of adjudged cases of that kind in *Chancery*. In the case in *Strange*, (*k*) there is no doubt but the honesty of the case inclined the court to the judgment they gave. The reason given turns upon a subtilty. The court of *Chancery*, in that case, would have interposed, and said the assignees should not have the goods without paying the price. I think the determination was right ; and there was an actual delivery to a person who became a trustee : but a post-boy is not a trustee. I think the case was well supported upon other grounds than those mentioned in the book.

I ground my opinion on this, whether the indorsement be fraudulent : and as to that, it is certain that the statutes of bankruptcy leave a trader, to the moment of an act of bankruptcy committed, every power an owner can have over his estate. The statute

(*k*) *Atkins v. Barwick*, 1 *Stra.* 165.

says, fraudulent conveyances shall be an act of bankruptcy. Other acts that are fraudulent are not made acts of bankruptcy : but they are attended with the consequences of fraud at law ; which is, that fraud renders every act void.

All acts to defraud creditors, or the public laws of the land, are void : and if the nature of the act be a conveyance or grant, it is not only void, but an act of bankruptcy. It has been determined that a conveyance by a trader of all his effects, for the payment of one or more *bonâ fide* creditors of the most meritorious kind, though his effects do not amount to half what is due, is void ; because it is not an act in the ordinary course of business ; it is not such an act as a man could do, but it must be followed by an immediate act of bankruptcy ; and it is defeating the equality that is introduced by the statutes of bankruptcy ; and the criminal (for the bankrupt is considered as a criminal,) is taking upon himself to prefer whom he pleases. But suppose he leaves out a considerable part of his effects : if it appears to be only colourable, that don't vary the case ; it is fraudulent. Suppose a trader makes a conveyance of all his estate for the payment of all his creditors except one, (which was the case of *Gayner*, cited in *Dematto's case*) (1) it is void. Suppose it was, to pay all his creditors rateably ; if there were no assent of his creditors, or composition, it would be void, for it would be rescinding the whole system of the bankrupt laws, and instead of applying to the great seal, he would choose his own trustees. If this is a fraudulent act, it is void.

A general question has been started, Whether in any case, upon the eve of a bankruptcy, a man may do that which in consequence prefers a particular creditor : and that has been argued as a general question. But that will depend upon the act. As if a bankrupt, in course of payment, pays a creditor ; this is a fair advantage, in the course of trade : or, if a creditor threatens legal diligence, and there is no collusion ; or begins to sue a debtor ; and he makes an assignment of part of his goods ; it is a fair transaction, and what a man might do without having any bankruptcy in view. Suppose such a case as *Small and Oudley* : (m) there it was for the advantage of the creditors, and no fraud to them ; and if part of the transaction were set aside as fraudulent, the whole must. But it never entered into the mind of any judge, to say,

(1) 1 *Bur.* 477.(m) 2 *P. Wms.* 427.

that a man in contemplation of an act of bankruptcy, could sit down and dispose of all his effects to the use of different creditors: for that would be a fraud upon the acts of bankruptcy. But if done in a course of trade, and not fraudulent, it may be supported.

This was not done in a course of trade: for there never was any dealing between the parties in sending indorsed notes. There was no application made by the defendant. And it was done with a view to positive iniquity: for the bankrupts had received this note from *Bryer* and *Everard*, for notes of the same value; and knowing they should become bankrupts the next day, to defeat *Bryer* and *Everard* of setting off their notes against it, indorse this note to another person. And there was no way of doing justice to *Bryer* and *Everard*, but supporting the claim now made by the assignees. So that there was express particular fraud at the time the fact was done. Next it is an act that is most certainly not complete as between the parties. The argument in the case of *Scott*, (n) is very applicable to the present. For there was a preference given to a *bond fide* creditor; but he knew nothing of it. Suppose in the course of trade, a bill is sent to *Constantinople*, and a bankruptcy happens in *England* before it arrives; yet it may be good. But here it is done because they were resolved to commit an act of bankruptcy."

So, in the case of *Martin* and others, assignees of *Edward Roberts*, a bankrupt, v. *Thomas Pwntress*, and *Josiah Roberts*, (o) which was an action of *trover* for goods to the amount of 19,562*l.* 17*s.* 8*d.* The facts were as follow: "The defendants were bankers, and large creditors of the bankrupt. *Edward Roberts*, the bankrupt, was the brother of the defendant, *Josiah Roberts*. The value of the goods for which this action was brought, got into the hands of the defendants in the following manner: *Edward Roberts* bought goods upon credit from several tradesmen who did not suspect his circumstances. The defendants employed agents to buy these goods from the bankrupt: particularly, one *Nathaniel Sweet*, who had been a bankrupt, and was then insolvent, bought, between *March*, 1767, and *June*, 1768, (when *Ed-*

(n) 4 *Bur.* 2174.
Cowp. 629. *S. P.*

(o) *Ibid*, 2477. See also *Rust v. Cooper*,

ward Roberts became bankrupt, to the amount of 7700*l.*, at prime cost: for which he gave his notes, payable at a future day. These notes were paid into the defendants; and *Sweet* sold the goods for the use of the defendants, and accounted with them for the profits, as their agent.

The defendants sent another man, one *Moses Birch*, to buy goods of the bankrupt to the amount of 2163*l.* 15*s.* 11*d.* prime cost; and furnished him with bank notes to that amount to pay for them. He paid these notes to *Edward Roberts*, the bankrupt, who changed them at the bank for others, which he paid into the defendants. *Birch* sold the goods for the use of the defendants, and paid them the produce; and in like manner as to all the rest. The price, at prime cost, was furnished in paper by the defendants to the agent; received by *Edward Roberts*, and returned to the defendants; or notes given by the agent, which notes *Edward Roberts* paid into the defendants and discounted with them: and the goods were all sold, for the benefit of the defendants; and the money accounted for to them, by the nominal and apparent purchasers.

The court gave judgment for the plaintiffs on the ground of *fraud*.

Lord *Mansfield*, Ch. J. said: "The fraudulent design and intention must depend upon circumstances. In the present case it is as clear as the sun, that the whole was a wicked scheme, concerted between the defendants and the bankrupt *Edward Roberts* to keep up his credit, to enable him to get goods which were to be employed to satisfy and discharge the debt due to the defendants. One of them is brother to the bankrupt. They must have known his insolvency: for to their knowledge the goods were sold at prime cost. The bankers did not deal in such goods. Had they bought them openly and in their own names, and applied the money to sink the debt due to them, the neighbourhood would have been immediately alarmed. They knew that the persons who sold their goods upon credit to the bankrupt, would never be paid."

So, in the case of *Harman* and others, assignees of *Fordyce v. Fisher*, (p) where the facts stated for the opinion of the court of

(p) *Cowp.* 117. *Loft's Rep.* 472. *S. C.* See also *Hague v. Rolleston*, 4 *Bur.* 2174. *Small v. Oudley*, 2 *P. Wms.* 427. *S. P.*

King's Bench were as follow: "The defendant was a creditor of the partnership of *Fordyce* and Co. and on various occasions had done them many acts of friendship, and being already a creditor for 1300*l.* upon the 6th of *June*, 1772, paid into the shop of *Fordyce* and Co. as bankers, the further sum of 7000*l.* and had it written in his book, according to the usual course; which sum he had borrowed for the purpose of accommodating the shop during the holidays; and at the time the money was paid in, he ordered the person who paid it to tell them he should not draw the money out before the *Friday* following, which they were told accordingly. On the 9th of *June*, *Fordyce* sat up all night settling his books and affairs in contemplation of absconding; and being possessed in his own separate right of the two notes described in the declaration, about 5 o'clock in the morning, he inclosed them in a letter to *Mr. Fishar* as follows: "Mr. *Fordyce* conceiving that the money lodged by *Mr. Fishar* with his house on *Saturday* last, was a sum, about which, perhaps, even some pains had been taken to place it there, he has the honour to show him that preference which he conceives is certainly his due."

5,500*l.* *Collins* and Co. 3d *July*.

11,702*l.* 18*s.* 4*d.* *T. Wm. Jolly*, 20th *June*.

That *Fordyce* delivered the letter and notes to *Mr. Harrison*, his clerk, with directions to carry them to *Mr. Fishar's* office, and give them to him.—About six o'clock the same morning *Fordyce* absconded and went to *France*. At half an hour after eleven o'clock the same morning a commission of bankruptcy duly issued against him. *Harrison*, about ten o'clock the same day called at the defendant's office; not finding him at home he returned again about twelve: but it being holiday time the office was shut up. That on *Thursday*, the 11th, *Harrison* delivered the letter with the notes to *Mr. James*, one of the partners of *Fordyce*, who sent for the defendant; when *Mr. James*, in the presence of the defendant and *Mr. Bellamy*, opened the said letter, and delivered it with the notes to the defendant, who having read the same to the company present, took them away with him: that they remain in his possession, and that he refused to deliver them up. That *Fordyce* was indebted to the partnership in a larger sum than the amount of the notes in question.

The

The court determined that the notes were given to the defendant fraudulently, and in contemplation of an act of bankruptcy; and therefore judgment was given for the plaintiffs.

So, where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for, he cannot rescind the contract, and return the goods, with the consent of the seller, so as to give the seller a preference to his other creditors.

Thus, in the case of *Barnes v. Freeland*, (q) which was an action of *trover* brought by the plaintiff as assignee of *Lloyd*, a bankrupt, for 60 tons weight of iron; and at the trial the following admissions were made by the parties. On the 9th of *November*, 1792, the defendant agreed to sell to the bankrupt 44 tons, 7cwt. 3qrs. 14lb. of iron at 15*l.* 15*s.* per ton, for the amount of which the bankrupt agreed to accept a bill of exchange at nine months date, to be drawn on him by the defendant; and the defendant, on the same day, delivered the iron to the bankrupt. The defendant, in pursuance of the agreement, on the same day drew a bill of exchange on the bankrupt for 699*l.* 4*s.* the amount of the purchase money payable at nine months after date, which the bankrupt then accepted, payable in *London*, and redelivered to the defendant, but it did not become due until after *Lloyd's* bankruptcy, and it has been since protested for non-payment. The bankrupt transacted business with *Caldwell* and Co. of *Liverpool*, as his bankers, and on the 18th of *March*, 1793, was indebted to them in a considerable sum of money; but the defendant was totally ignorant of the state of their accounts. On the 18th of *March*, 1793, *Caldwell* and Co. stopped payment, of which the bankrupt heard in the morning of that day, and immediately went to the house of the defendant; and informed him that the bank of *Caldwell* and Co. had failed, and that he should not be able to take up the bill which he had accepted, for the amount of the iron, meaning the bill before mentioned; for that in consequence of *Caldwell* and Co.'s failure he (the bankrupt) must stop payment. On the same day he wrote to several of his creditors to the same effect, as to the necessity of his stopping payment; and the bankrupt informed the defendant that the before mentioned 44 tons, 7cwt. 3qrs. 14lb. of iron

had not been removed from the warehouse wherein it was at the time of the sale to the bankrupt, and said he thought it would be an act of justice to return to the defendant the iron so bought, as he should not be enabled to pay for the same, or to take up the accepted bill. The defendant accepted of the offer so made by the bankrupt, but said he did not wish to have the iron, unless the transaction was fair and right; and at the same time the bankrupt delivered a bill of parcels to the defendant dated the 16th of that month of 50 tons of iron, including the iron so bought on the 9th of *November*, 1792, because he at that time owed the defendant a further sum of money on a bill accepted by the bankrupt for another parcel of iron bought by him from the defendant; and he therefore thought it his duty to give up the additional quantity beyond the 44 tons, 7cwt. 3qrs. 14lb. This bill of parcels was dated on the 16th of *March*, 1792, and was for 50 tons, at 15 guineas *per* ton, amounting to 787*l.* 10*s.* The bankrupt, in his account with the defendant, debited the defendant with the amount of this bill of parcels thus, "*March* 16th, to amount of 50 tons of iron, sold him this day, 787*l.* 10*s.*" 44 tons, 7cwt. 3qrs. 14lb. part of the iron mentioned in this bill of parcels is the same which was sold and delivered by the defendant to the bankrupt on the 9th of *November*, 1792; but the remainder was a parcel of iron which the bankrupt had received in exchange for other iron which the defendant and the bankrupt had some time before purchased in partnership, which, upon a division of such joint purchase, had been allotted and delivered to the bankrupt, the bankrupt and the defendant having overpaid the sellers of the last mentioned iron, bought on their joint account, they received the balance from the sellers in a bill, which has been since the bankruptcy of *Lloyd* protested for non-payment, and taken up by the defendant; and this is the only unsettled transaction relative to that co-partnership. No conversation passed between the bankrupt and the defendant on the 18th of *March*, relative to this co-partnership transaction. On the 18th of *March* 1793, the bankrupt delivered the last mentioned bill of parcels, and also the key of the warehouse wherein the whole of both parcels of iron was deposited but not intermixed, to the defendant, who kept possession thereof, but did not return to the bankrupt the bill of exchange for 699*l.* 4*s.* which was accepted by the bankrupt as aforesaid, he the defendant having paid away the same in the usual course of trade, and the same was not then in his the defendant's

defendant's possession, but the defendant promised to take up and cancel the same, which he accordingly did. The defendant has, since the bankruptcy of *Lloyd*, sold the whole of both parcels of iron on his own account, and received the purchase money for his own use. The defendant did not make any application to the bankrupt to redeliver or re-sell to him the iron included in the last mentioned bill of parcels: but the same was a voluntary offer of the bankrupt wholly unsought by the defendant. This iron was all the stock in trade of the bankrupt in his actual possession: but the defendant was not privy to this fact: and the bankrupt was indebted to the defendant in a further sum of money, exclusive of the transaction before stated, viz. 200*l.* and upwards. The bankrupt, knowing himself to be insolvent, was determined not to do any other business after the failure of *Caldwell* and Co. as before mentioned; and he, therefore, without the knowledge of the defendant, until the same was delivered to him, dated the bill of parcels the 16th of *March*, and entered it in his books under that date. The bankrupt did not transact any business after that date: on the 23d of *March* he committed an act of bankruptcy; a commission of bankrupt issued against him on the 28th day of the same month; and the plaintiff is assignee of his estate, &c. The iron which the defendant sold to the bankrupt on the 9th of *November*, 1792 is of the value of 66*l.* 9*s.* 1*d.* and the remainder of the iron included in the latter bill of parcels made by the bankrupt to the defendant on the 18th of *March*, 1793, is of the value of 59*l.* 13*s.* 5*d.*

The court were of opinion, that the buyer could not rescind the contract, and return the goods to the seller, so as to give him a preference to his other creditors.

Lord *Kenyon*, Ch. J. said: "The rules of law are framed with a view to benefit the bankrupt's creditors in general, and not to give a preference to any in particular. It is said, however, that the vendor may in all cases rescind his contract with the consent of the vendee at any time before the bankruptcy of the latter: but if that were so, all the creditors of a bankrupt, whose goods remained in his hands in specie, might, when they found that he was in insolvent circumstances, go to the bankrupt's property, and bring away what each had contributed to the fund, leaving nothing to satisfy the rest of the creditors. The present seems to be an extremely

*It may
stop them in
transit
(Sep 40)*

tiemely clear case, for it is founded in fraud. The parties themselves endeavoured to give a different complexion to the transaction from that which is the true one, and in order to mislead the creditors of the bankrupt, they made a false entry in the bankrupt's books; where it was stated that the re-delivery of the goods to the defendant was made two days before the time when the transaction really took place; and that fact is of great importance: because that ante-date carries the re-delivery back to a time previous to the bankruptcy of *Caldwell* and Co. on which depended the solvency of the vendee. The goods here were originally sold and delivered to the vendee, and they were locked up in his warehouse; therefore there was a complete transfer of the property from the defendant to the bankrupt at the time; and the question is, whether, when the latter became insolvent he could re-deliver it back to the defendant in specie. I cannot distinguish the present case from that of *Harman v. Fijbar* (r) on principle, for this bankrupt knew his insolvent situation at the time when he wished to deliver back the goods in question to the defendant, as well as *Fordyce* did in that case; there *Fordyce*, finding that he was insolvent, was anxious to repay to the defendant some bills which the latter had lent him, and though those bills were as easily distinguishable from the rest of his effects as the iron in question was from the rest of this bankrupt's property, the Court there held that it could not be done, because it would prejudice the other creditors of the bankrupt. Three cases, however, have been cited, and pressed upon us, as deciding the present: but I think they are to be distinguished from this. In *Atkin v. Barwick*, (s) the vendees finding that their affairs were in a declining condition before the goods arrived at their house in *Cornwall*, refused to accept the goods, and thereby refused to become parties to the contract of sale: and though when the goods did arrive by the waggon, the vendees could not turn them loose in the street, yet they did what was tantamount to rejecting them, they sent them to a friend of the consignor's for their use. In *Salte v. Field*, (t) consider who was the party to the contract; not the clerk of the vendee who lived in *London*, but *Dewhurst*, who was residing in *New York*; and he, knowing his insolvent situation, sent orders a month before the transaction in dispute took place, to his clerk here, not to purchase any more

(r) *Ants*, 460.

VOL. I.

(s) 1 *Str.* 165.

Hh

(t) 5 *Term Rep.* 211.

goods

goods for him; the clerk, immediately on the receipt of this order applied to the vendors to take the goods back again, who agreed to rescind the contract. In giving my opinion on that case, I said, that "the property in the goods was apparently divested out of the plaintiffs at the time of the sale, according to the opinion which the parties then had of the transaction:" but though the property was then apparently divested out of the vendors, it was not so in reality, because the delivery to the agent of the vendee was controuled by the prior orders of the bankrupt, his principal. But in this case the goods were delivered to, and accepted by the vendee, and the property remained in him until he became insolvent. What was said by Lord *Hardwicke*, in the case alluded to, does not apply to such a case as the present: he only said that, "before the contract was complete, and while the goods were *in transitu*, the owner might by any means, without committing a felony, regain the possession of his goods for which he had not been paid. That, though said in a court of equity, is now become a general and a good rule of law: but it must be confined to those cases where the goods are *in transitu*. Our decision therefore against the defendant in this case will be conformable to every decided case, and to the reason of the thing."

Asbburß, J. said: "It was admitted in the argument, that if the contract of sale were not rescinded at the time of the bankruptcy of the vendee, it could not be rescinded afterwards by any act of the contracting parties; now I think that the contract here was not rescinded before the insolvency of the vendee. After the contract for the sale of the iron, it was actually delivered to the vendee, and put into his cellar, and he gave a bill of exchange for the payment of it; then the contract was complete, and could not be rescinded by any subsequent act of the parties, so as to affect the interests of third persons. But it has been said that this iron was not mixed with the rest of the bankrupt's stock: it is not necessary that it should be mixed; but if it were, this iron was, to a certain degree mixed with the rest of the stock, for there was some other iron in the same cellar. I do not rely, however, on that circumstance, because I think it immaterial; for if once the goods be fairly and completely delivered, whether they be or be not mixed with the rest of the vendee's stock, the bankrupt and the vendor cannot

cannot rescind the contract, if the rights of other persons intervene, with a view of giving a preference to the vendor."

So, where the acceptor of a bill of exchange, two days before it became due, called upon the holder and informed him privately that he was insolvent; the holder insisted on being paid the amount of the bill, whereupon the acceptor paid it, and four days afterwards became bankrupt: the bill was altered, (but without the defendant's knowledge,) so as to make it fall due before this transaction: this was held to be sufficient proof of fraudulent preference.

Thus, in the case of *Singleton* and others, assignees of *Howell*, v. *Butler*, (v) which was an action of *assumpsit* for money had and received. At the trial before Lord Eldon, Ch. J. at Guildhall, at the sittings after *Trinity* term, 40th Geo. 3. the following case was proved: The defendant having drawn a bill of exchange on *Howell*, the bankrupt, dated the 1st of *March*, 1796. payable to his own order three months after date, it was accepted by *Howell*, and indorsed by the defendant to his bankers. On the 2d of *June*, which was two days before the bill would become due, as it was originally drawn, *Howell* came to the defendant, and told him, that in consequence of several houses having failed, he had lost large sums of money, and his bills had been returned upon him; and he informed the defendant as his friend, (but informed no other person thereof) that his affairs were bad and would not pay above 10s. in the pound. Upon this the defendant said that *Howell* must pay his bill, and that if he would, he, the defendant, would be security to *Howell*'s creditors for so much as the estate should produce, if they agreed to a composition. *Howell* accordingly paid the bill, and on the 5th of *June* became bankrupt. It also appeared that the date of the bill had been altered from the 1st to the 21st of *March*, and that the time of payment had been altered from three months after date to two months after date. There was no evidence, however, to show by whom this alteration was made, or that the defendant had any knowledge of it, but the circumstances of the case rather afforded a presumption that he did not. His lordship observed to the jury, that this was a bargain for a fraudulent preference, the consideration of which was of no value; that the circumstance of the bankrupt having called upon the defendant two days before the bill became due, and after disclosing his situa-

(v) 2 *Bar. & Pul.* 283.

tion, having acceded to the defendant's offer, afforded strong ground for them to infer fraud, and that the inference of fraud, as far as related to the bankrupt, was rather strengthened by the alteration which had taken place in the date and time of payment of the bill. The jury found a verdict for the plaintiffs for the amount of the money received by the defendant on the bill.

In the following term the counsel for the defendant moved for a new trial, and it was contended that the preference given to the defendant was not voluntary, inasmuch as the defendant had insisted on having the bill paid, and that it was not necessary there should be any threats of legal process to rebut the presumption of fraudulent preference. He cited *Smith v. Payne*,* where a security given to a creditor by a debtor at the mere instance of the former, but without any threats of an arrest, was held valid, though the debtor himself informed the creditor of the bad situation of his affairs. Lord Eldon, Ch. J. having stated the case to the court with his directions thereupon, declared himself of the same opinion which he gave at the trial, and distinguished this from the case of *Smith v. Payne*, because there the creditor came to the debtor, and the security was taken for a debt actually due.

The rest of the court concurring with his lordship, the rule for a new trial was refused.

See copy of *Smith v. Morgan* ante 441
But if a bankrupt make a payment to a creditor under the apprehension of legal process, however groundless, such preference is valid.

Thus, in the case of *Thompson* and others, assignees of *Jane Wiseman, v. Freeman*, (u) which was an action of *trover* tried before Buller, J. at the sittings after Hilary term, 26 Geo. 3. at Guildhall, and was brought by the assignees of the bankrupt in order to recover some goods which the defendant had taken possession of under a warrant of attorney to confess a judgment executed by the bankrupt about six months before the act of bankruptcy committed, but at a time when she knew she was in an insolvent state.

The defendant had, in the year 1780, joined in two bonds with the bankrupt, and had received a counter bond of indemnity.

* Post 470. (u) 1 Term Rep. 155. See also *Hartshorn v. Slodden*, 2 Ber. & Pul. 582. S. P.

When these bonds became due, the bankrupt, not having wherewithal to discharge them, applied again to the defendant, and engaged him to join with her in two new bonds, payable in *July*, 1784, for the purpose of raising money to take up one of the old bonds: one of them was accordingly taken up the 14th of *Jan.* 1784. The defendant took another counter-bond of indemnity upon his joining in the two last bonds. Previous to the 3d of *June*, 1785, the day on which the act of bankruptcy happened, the bankrupt sent for the defendant, and proposed to him that he should take out his debt in goods, to which he acceded, and the warrant of attorney in question was given. It appeared that her reason for sending for the defendant originated from a letter, taking notice, though not in a threatening manner, of her situation with respect to the defendant, which letter she had received just before from Messrs. *Fosset* and *Bellamy*, whom she knew to have acted, in a former transaction, as attorneys for the defendant, though upon this occasion they were not in fact concerned for him. The two last bonds were not discharged by the defendant till some time after the execution, nor had the obligees ever threatened to resort to him for payment at that time, the bonds not having then become due.

Another circumstance was also much relied on for the plaintiffs at the trial, that the defendant upon his examination before the commissioners had sworn, that when he took possession of the goods under the warrant of attorney, he was not an actual creditor.

The learned judge left it to the jury to consider whether the means which the bankrupt put into the defendant's hands to pay himself were fraudulent or not; for if she had executed the warrant of attorney from necessity, or in order to save herself, though, perhaps, acting by mistake, or under a false apprehension that the defendant was taking due means to enforce his demands upon her, it was certainly a legal act; but if she had acted merely with a view to favour the defendant, and give him an unjust preference, it was void. The jury found a verdict for the defendant. In the following term a motion was made for a new trial, which the Court refused; and Lord *Mansfield*, Ch. J. said: "A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor; but if under fear of legal process, he gives a preference, it is evidence that he

does not do it voluntarily. And though the defendant in this case had taken no steps to secure himself in case he was called upon, yet the bankrupt, acting from mistake, was under the same apprehensions of legal process, as if the defendant had actually threatened her; so that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be."

So, where a creditor, knowing his debtor to be in distressed circumstances, and not able to pay his debt, applied to him, in the first instance, about two months before his bankruptcy, for a security, and took part of his stock in trade for that purpose: this is not an undue preference, though the creditor did not threaten to sue in case of a refusal.

Thus, in the case of *Smith* and another, assignees of *Hamilton, v. Payne*, (w) which was an action of *trover*; and the question was, whether the defendant had not obtained them from the bankrupt, upon the eve of his bankruptcy by means of an undue preference given to him by the bankrupt. It appeared that about *April, 1793*, the bankrupt, who was a bookseller, being indebted to the defendant in several sums of money, amounting to about 385*l.* the latter happened accidentally to call upon him, when the bankrupt informed him that he was afraid of being arrested, for that a person had been to demand 80*l.* which he owed, and was unable to pay: the defendant thereupon told him that he was fearful he (the bankrupt) was in a bad state, as he had repeatedly told him in like circumstances, but if he could get over the day, he should do very well. The bankrupt expressing his fear of being arrested, the defendant told him he would be ruined if he were, as he would not be able to get bail: the defendant, however, went immediately to a friend in the neighbourhood, and borrowed 80*l.* brought it back to the bankrupt, and desired him to go and pay the debt directly. Shortly after this transaction the defendant applied to the bankrupt, and represented to him that he did not like to have the account unsettled, and so large a sum due to him, and desired to see what books he could have out of the shop in order to cover his demand; the bankrupt admitted that he did not ask for money, as he thought he could not get it. The bankrupt showed him his catalogue; and

he selected the books in question at prime cost, being such as he thought the bankrupt could best spare, without impeding the carrying on of his business; of which books the defendant was immediately put in possession. The defendant further admitted that he took the books to save himself, and that he would not have taken them, but that he was apprehensive he could get no money, and therefore he had not asked for any; that he had taken about 58*l.* in notes, having taken this transaction, and he admitted that he did not purchase the books in order to sell them for profit, but to cover his debt, as he was apprehensive of the bankrupt's circumstances, having often heard him complain of them. The act of bankruptcy was committed on the 4th, and the commission was sued out on the 6th of *July*, 1793. The bankrupt himself was examined as a witness at the trial, and he swore that the transaction between him and the defendant was without fraud, and that he did not meditate any act of bankruptcy at the time. Lord *Kenyon*, Ch. J. at the trial, inclined to think that, upon the whole of the case, it appeared that the offer of the security was voluntary on the part of the bankrupt, and that the bad situation of his affairs was known to the defendant at the time the latter accepted of it; and therefore he recommended the jury to find a verdict for the plaintiffs; they, however, found for the defendant.

The counsel for the plaintiff moved for a rule to show cause why the verdict should not be set aside. But the Court were of opinion that there was no undue preference in this case, and therefore refused the rule.

Lord *Kenyon*, Ch. J. said: "I confess that the impression which I received at the trial was unfavourable to the defendant: but the jury thought differently; and I see no reason, upon maturer consideration, to differ from the conclusion they have drawn. I think I laid too much stress upon the admission made by the defendant, that at the time he applied to the bankrupt he did not ask for money because he thought he could not get it; for in truth, the same observation may apply in many instances to creditors taking security instead of actual payment, for their debts:

This also shows that this was not a voluntary offer on the part of the bankrupt, but that the security was given in consequence of his being pressed by the defendant for that purpose, who was not disposed to trust him any longer. It is admitted that if the defendant had threatened the bankrupt in case of his refusal, the transaction would have been valid; but there is no occasion for a creditor under such circumstances to threaten an actual arrest; and here the defendant did press the bankrupt for a security. And under these circumstances the bankrupt himself having sworn to the honesty of the transaction, and that he did not meditate a bankruptcy at the time, and the jury by their verdict having negatived the idea of collusion, there is no ground for setting aside the verdict."

If goods are consigned by a bankrupt (previous to his bankruptcy) to a factor who is fully acquainted with his insolvency; and upon such consignment money is advanced by the factor; this is not a fraudulent consignment; and the factor is entitled (as against the assignees) to retain the produce of the goods in satisfaction of the general balance due to him from the bankrupt.

Thus, in the case of *Foxcroft* and others, assignees of *William Satterthwaite*, a bankrupt, v. *Devonshire*, and others, (*) which was action of *assumpsit* for money had and received to the use of the plaintiffs as assignees. The facts of this case being fully stated in the judgment of the court, as pronounced by Lord *Mansfield*, Ch. J. it will be unnecessary to state any thing more than what he said on this occasion, which was as follows: "This matter came before the court, upon a motion for a new trial, on the ground of a misdirection by the judge who tried the cause. It was admitted at the trial, that *Satterthwaite*, the bankrupt, was a trader: and the debt of the petitioning creditor, the commission, and the assignment, were likewise all admitted. The action was brought for monies arising from the sale of goods that had been consigned by the bankrupt to the defendants as factors for him, and sold by them as such; which money was admitted to be in the defendant's hands, and amounted

(*) 2 *Bur.* 931. 1 *Bl. Rep.* 193. S. C.

to 5314l. 17s. 9d. It appeared that the defendants had paid several sums of money, to *Satterthwaite's* use, upon bills drawn upon them by him, and otherwise. The plaintiffs (the assignees under the commission) proved some secret acts of bankruptcy to have been committed by *Satterthwaite* about *Christmas*, 1751; namely, his being denied to his creditors. On the other side it was proved, that he soon appeared again publicly as usual; and continued to do so till about the month of *August* following (1752), but in that month, he stopped payment: and thereupon the commission was taken out. These secret acts of bankruptcy, committed at *Christmas*, 1751, over-reached the consignment of the goods, the sale of them, the receipt of the monies for which they were sold, and likewise the time when the defendants advanced the monies to the use and order of the bankrupt.

It was insisted by the counsel for the defendants, from the nature of the present action, the defendants, being factors, ought to be allowed not only for their commission, and all charges and expences, but also whatever money they had paid on account of bills drawn upon them by *Satterthwaite*; and that the plaintiffs in this action could only recover the balance of the general account.

The counsel for the plaintiffs admitted that the defendants were entitled to be allowed their commission, and all charges and expences as factors; but not the bills of exchange drawn by *Satterthwaite*, which they had paid subsequent to the act of bankruptcy.

This question was agreed to be reserved, (if it should be necessary to have recourse to it,) as a point for the future consideration and determination of the judge who tried the cause. But the counsel for the plaintiffs insisted on a preliminary point; viz. that the defendants were guilty of a fraud, in paying these bills of exchange, drawn upon them by the bankrupt: which preliminary point of fraud was sufficient to destroy any right that the defendants might otherwise claim (supposing the transaction had not been fraudulent,) to an allowance of the money paid in discharge of them; and consequently to preclude them from entering at all into the question above-mentioned. For if it should be admitted

mitted on the part of the plaintiffs, that this action of *assumpsit* affirmed the contract, yet if their payment of the bills was fraudulent, it would at once put an end to their claim of an allowance of the money as fraudulently paid. They granted that in case the defendants should appear not to have been guilty of any fraud, but to have paid the bills fairly and honestly, they would then have a right to enter into the point reserved (as above) for future consideration: but they insisted that upon supposition, that in a common case, this sort of action would confirm the contract, so as to make the consignment, sale, and payment of the bills to be considered as before any act of bankruptcy committed; and consequently, that the defendants would be entitled to retain what they had paid upon the bills; (for every thing that could be alleged by the defendants must, *pro hac vice*, be admitted upon a previous bar to their going into the question;) yet the bar of fraud would destroy any demand they could have upon that account. And the fraud which they charged upon the defendants was this, "that they were privy to *Satterthwaite's* insolvency, at the time when they advanced the monies, to discharge his bills."

Upon this preliminary point only of fraud, it was left to the jury: and upon this point only, they found their verdict. Upon hearing all the evidence, they were of opinion that the transaction was fraudulent on the part of the defendants; and they gave a verdict for the plaintiffs for the whole money; deducting only the commission due to the defendant, and the expences of the sale of the goods.

Though the ground of the verdict should be wrong, yet, if it clearly appeared to us now, that upon the whole no injustice had been done to the defendants; or if it clearly appeared to us now that the plaintiffs, by another form of action could recover all they have got by this verdict, we think the Court ought not to grant a new trial. But if injustice be done to the defendants by the present verdict, and if it be not certain and clear that the plaintiffs might have equal redress, and recover as much, by another form of action; then we ought to grant a new trial.

Two points have been argued and urged on the part of the plaintiffs.

1st, That clearly the defendants were not to be allowed to retain for the bills : because, 1st, They were not paid till after an act of bankruptcy ; 2dly, this action of *assumpsit*, only admits the sale of the goods, and nothing else but the agency of the defendants in that single respect ; and 3dly, if it admitted every thing so as to put the assignees in the very condition the bankrupt would have been, had he brought this action, yet a factor has no lien for items of a general account (his lien being confined to his commission and expences about the particular goods.)

These points have not been at all considered in this action : and therefore it is enough if they are doubtful. They went off, upon the preliminary question of the fraud being taken up and pursued, and were never afterwards taken into any further consideration at the trial.

We are not clear that this action of *assumpsit* does not affirm the power of the bankrupt and the contract, throughout the whole transaction. Where such an action is brought by assignees of a bankrupt's effects against a vendee of goods, it affirms the sale, and also the payment to the bankrupt of any part of the price. It is agreed here, that it admits the consequence of the defendants being factors ; and allows a lien for commission and expences.

That a factor has also a lien upon goods consigned, whilst they remain in his possession, for items of a general account with his principal, has been solemnly determined. However, the present case differs from the case of *Kruger v. Wilcocks*,* where it was so determined. For there the factor remained in possession of the goods : but here the goods have been sold, and turned into money. In such a case there never was a doubt but that mutual items of account might be set off : the demand and recovery can only be for the balance. Therefore it is impossible to say, that the question the defendants would have made upon this point, had they been permitted, may not be very material. And if it might have been material to their defence, they have a right to have it tried and considered.

2dly, Another matter gone into at the trial, and urged by the counsel for the plaintiffs, was, that in an action of *trover*, the plaintiffs might certainly recover the value of the goods, without making any allowance.

* *Ants.* 1 Vol. 267.

This would depend on a variety of circumstances, which were not gone into at the trial because the counsel for the defendants were stopped and cut short by the preliminary bar of the fraud, which was alone sufficient to invalidate their claims as upon a fair transaction. This makes it necessary to examine the ground of the verdict, which proceeded from the direction given. I will admit "that the evidence proved the fact, and every conclusion deducible from it:" but I cannot think that the fact so proved, or conclusion so drawn, amounts to that offence which the law calls fraud, to avoid the debt. And in examining this matter, we must remember, that, *pro hac vice*, the whole transaction is admitted to be before any act of bankruptcy. Fraud often is a mere fact; as when it depends (as on a policy of insurance, for instance,) upon what the party said or did: or it may be, and often is a question of law. Suppose a creditor, knowing a trader likely to break, conceals it from the knowledge of other creditors, till he gets, even by threats of legal process, payment of his debt before any direct act of bankruptcy; and the assignees should insist this was a fraud, and that he should refund: this is a matter of law; and the law would say, that this was not fraudulent. Suppose a man *bonâ fide*, lends money to a trader upon a mortgage, after an act of bankruptcy without notice; and then knowing of the commission of bankrupt and assignment, gets in an old term, even for little or no consideration; and the assignees bring an ejectment; and it becomes a question whether this be a fraud, or not; this is a matter of law; and the law will say, it is no fraud; for the mortgagee had a right to do this.

The evidence of fraud in this case, as stated by the report, are the following letters. The first is dated, *Bristol, 5th May 1752*, signed "*Devonshire and Reeves*," and directed to "*William Satterthwaite*" "We wish you had been open, and told us in time how your affairs stood—it appears to us very evidently, you have risked your reputation and credit on the faith of those S. Do but consider where you must have been in point of reputation, had we done otherwise than we did.—It is now over; and we will not do any thing that should lessen your credit. Therefore ship not an ounce of goods more till your affairs are settled."

The next letter is dated *Bristol, 15th May, 1752*, signed "*Devonshire and Reeves*," and directed to *William Satterthwaite*, merchant

in *Bristol*; and contains the following passage: "We cannot help being uneasy to think you have drawn on us again for 120*l*. Really you will make us let your bills go back protested, in spite of our inclinations. We will pay this; but take notice, don't draw another: we friendly hint it."

The next letter is dated 25th *June*, 1752, signed and directed above; and is thus: "*William Satterthwaite*, esteemed friend—We really fear these proceedings will greatly hurt your credit in the eyes of every judicious person: it is very natural to think that will be the consequence. For our part, we would make a thousand shifts, rather than trifle with our reputation, as you do with yours.—It's a matter well worth your serious consideration."

"P. S. Inclosed we return you *Liebenrood's* draft, 150*l*. which with one shilling postage, place to our credit. This is such a thing we never did before, nor ever will again."

The next letter is dated 27th *June*, 1752, signed as before, and directed to *William Satterthwaite*. After referring to the last, it goes on thus.—"In this last letter, thee mentionest nothing of remitting for *Liebenrood's* bill, which thee ordered us to send for from *London* four days before due, (which we did, and returned thee in our last,) though thee promised us faithfully to remit for the same, last 6th day was a week: and having had sundry letters that take no notice thereabout, we cannot help thinking and saying that thee trifles with thy creditors and us. We are so much in want of money as thee canst possibly be; and had we thought thee wouldst have treated us in this manner, we would not have advanced one quarter of the sum, to be allowed 10*l*. per cent. The disappointment to us gives more uneasiness than all the profits of a year's trade will do us."

The next letter is dated 14th *July*, same year, and signed as before, *William Satterthwaite*, and is as follows: "Esteemed friend, so much for your affairs, in and under our care; which shall be managed with all care and frugality. But what next we say appears to us in a very odd light: for *Edward Wilcox* has been with us, and says you have made over our goods on the *Sarah* and *Martha*. If true, gives us such ideas that we dare not put pen to paper to say our sentiments. If you send us any more bills—if ever we do return a bill we will return yours."

The next letter is the 28th *July*, the same year, signed as before: and is as follows.—"*William Satterthwaite*, the *Sarah* and *Martha*, your 3-8ths. The *Carolina*, how much? tell us: for you



you must secure us, by a bill of sale of each, that is your parts.— Unless you send here, some security.— Say your father, *Moss*— join in a bond, or some good man. *Creditors* will be made upon us, for their proportions of cargoes we have sold; as *Touchetts* did of the rice. We are willing to stand by you as far as we can with prudence: but an undoubted counter security we must have—We dread the consequences of these repeated strokes, we very much suspect you have not the money—We must have your affairs cleared up—Whatever you are, we are almost broken-hearted to see how you are going on, and have of late. And what will be the consequence, if you are worth 3000*l*.? we know and have seen the consequence elsewhere.”

Some vague suspicions beside, have been mentioned at the bar, by the counsel for the plaintiffs: as, that they were all of them quakers, and endeavouring to play into each other's hands, to the prejudice of *Satterthwaite's* other creditors; that *Satterthwaite* had broke before; that all the bills were after *May*; (which the other side deny.)

But as I proceed upon allowing the evidence to prove the conclusions contended for, it is only necessary to examine what those conclusions are. The report says that a false credit was given the bankrupt: i. e. he would have broke openly unless they had lent him money. The counsel for the plaintiffs say, the defendants lent him money to keep him from failing, till his ships and goods might come home, consigned to themselves, or even to the bankrupt's own hands: whereas if a commission had issued before that time, the assignees would have had them.

It was left to the jury, that if they believed from the evidence, that the defendants knew or understood the bankrupt's circumstances to be insolvent at the time they paid his bills; they might find against them, upon the ground of fraud. And they found, in the affirmative.

Had the question turned upon the validity of a payment made after an act of bankruptcy committed within the act of 19 *Geo. 2. c. 32.* (which was one of the points made at the trial,) the direction would have been quite agreeable to the terms of that act. But, as the question was, whether, supposing the whole transaction before any act of bankruptcy committed, the defendants were to be excluded from claiming satisfaction for the money they had advanced upon *Satterthwaite's* bills, by reason of their fraud

fraud in advancing it.—“We are all of opinion that the direction was a mistake.”

It is no fraud, for a factor, knowing the circumstances of his principal to be desperate, and believing he must break unless he can procure credit, to advance money upon his bills, to save him from an immediate failure. On the contrary, it is an honorable, friendly, and generous act. No prejudice can arise, but to the lender himself. He may lose the whole or the greatest part of the money so advanced: but the principal's estate, if he breaks, is by so much a gainer; or some particular creditors to whom this money has been paid, are gainers. If by this assistance, the principal has the good luck to stand his ground, he and all his creditors are benefited: but none of his creditors can suffer by the advancement of money to their debtor. Many beneficial instances of this kind have saved the most considerable houses from ruin. If the factor trusts that effects of his principals will come over from abroad consigned to him, by which means he may acquire a lien upon them for his reimbursement, the factor's conduct is a little more prudent; but still it is free from all colour of fraud. It is the usual method of dealing between principals and factors in good credit; the latter advance money upon the faith of consignments: but when a factor, knowing his principal to be in great distress, and in immediate danger of failing, advances money upon the faith that effects beyond sea will come over consigned to him, he acts meritoriously. The richest man in trade may be ruined, while his effects are abroad, and not in his own power, to answer immediate demands upon him, (which was the case of the *Woodwards*, who could not save themselves from failing; though they had sufficient to pay 30*s.* in the pound). But the factor may actually save him by this assistance, till they come home: and yet the factor himself runs a great risque, and trusts to a precarious security. For the goods may in fact be consigned originally to another; or the consignment to him may be countermanded, they may be sold; they may be mortgaged, or burnt, or lost, and never come into his possession so as to give him any lien; and it appears by the letters that have been read, that in this very case, *Satterthwaite* unworthily made over to other persons part of the goods to which the defendants had trusted for their security.

A mort-

A mortgage of ships abroad, or of cargoes upon the high seas, by a trader, to any body is good, notwithstanding the clause in 21 Jac. 1. c. 19. though possession has not been actually delivered: for a bill of sale is all the possession that can be delivered, till the ship comes home.

There scarce happens a bankruptcy in which it does not appear that a fictitious credit has been acquired by drawing and redrawing bills of exchange, and by accepting and indorsing promissory notes: yet there never was a doubt, but that the persons lending their names, by which they render themselves at last liable, may come in as creditors. The case of a man who has actually paid his money to support the credit of another, is infinitely stronger than that of lending a name only, without advancing any money at all. There cannot be a greater paradox than that a man should be guilty of a fraud in lending his money with no other prospect but the chance of being repaid it. A notion that lending money to traders, knowing them to be in dubious, tottering, or distressed circumstances, upon mortgages or liens, is fraudulent, and, consequently the contract void in case a bankruptcy ensues, would throw all mercantile dealing into an inextricable confusion. Men lend their money to traders upon mortgages or consignment of goods; because they suspect their circumstances, and will not run the risk of their general credit. Upon the whole of this case we are of opinion that there must be a new trial."

Where goods are sold, or money is paid by a bankrupt after an act of bankruptcy, the assignees may maintain an action of *assumpsit* or *trover* for the amount thereof.

Thus, in the case of *Hussey v. Fiddall*, (y) which was an action of *assumpsit*, brought by the assignee of a bankrupt for goods sold and delivered by the bankrupt after an act of bankruptcy.—It was objected that the action should have been *trover* and not *assumpsit*, because *trover* might be brought for the same cause again. But *Holt*, Ch. J. said: "the assignees may avoid the sale if they will,

(y) 12 Mod. 324, & vide *Cooper v. Chitty*, 1 Bur. 20. 1 Bl. Rep. 65. S.C. and *Hitcher v. Campbell*, 3 Will. 304. 2 Bl. Rep. 827. S.C.

and bring *trover* for the goods; but if they bring the one, they shall not after bring the other. By act of bankruptcy the property of the goods is in the bankrupt's creditors; and if it be a *chose in action* that is assigned, the assignee is to have the same remedy for it as the bankrupt himself might have had; as if it be money received to the use of bankrupt, they are to have such remedy as he might have had for it; and without doubt the action well lies here, and even a general *indebitatus assumpsit* would have done."

So, in the case of *King*, assignee of *Langman v. Leith*, (x) which was an action of *assumpsit* for money had and received to the use of the plaintiff as assignee. The facts of the case were these: *Langman* the bankrupt was arrested, on the 19th of *January* last at the suit of the plaintiff, and he became bankrupt by lying two months in prison, which expired on the 26th of *March*. On the 19th of *February* the plaintiff's attorney gave notice by a letter to the defendant, (who had been employed by *Langman* about the latter end of *January* as a broker to sell his effects) not to sell them, because *Langman* had committed an act of bankruptcy, that a commission of bankrupt would shortly be issued against him, and that the act of bankruptcy would relate to the day when it was committed, which was some time past. The defendant in his answer to this, dated 23d of *February*, said, that as he had advertised the sale, and begun to sell, and the goods would not produce the sum for which *Langman* was in prison, he had thought it better to complete the sale; and that he had sold the effects without any design to defraud. On the first of *March* the defendant paid *Langman* 120*l.* being the produce of the sale. The defendant's counsel objected, first, to the form of the action, and that it should have been *trover*; and secondly, that the sale and payment were good, being before the act of bankruptcy was complete.

But the court over-ruled these objections and gave judgment for the plaintiff.

Asbhurst, J. said: "Whatever doubt may have been formerly entertained upon this question, it is now clear that the assignees of the bankrupt have an election to bring either *trover* or *assumpsit* in a case like the present. The only distinction attempted to be

taken between this and other acts of bankruptcy is, that all the other acts of bankruptcy are complete in themselves, whereas this is a complicated matter, and is inchoate till the party has lain in prison two months; and therefore the act of bankruptcy is not complete till the expiration of that time. But I do not think that makes any difference; for as soon as the two months are expired, it relates back to the time of the first arrest, and then operates as if the arrest were a complete act of bankruptcy in itself. Then if the act of bankruptcy over-reach all intermediate acts so as to vest the property in the assignees from the time of the act committed, it follows as a necessary consequence that they may either affirm or disaffirm the act of any party who, after the act of bankruptcy, has converted the trader's effects into money, either by bringing an action for money *had and received* to their use, or by bringing *trover*; and here they have chosen the former. The statute of George the Second makes no difference; that only provides that no payment shall be set aside which is *bond fide* made to the bankrupt in the common course of trade: but this cannot be said to be a payment really and *bond fide* made in the common course of trade, because the defendant had express notice of the bankrupt's situation. And though, strictly speaking, at the time of the notice the act of bankruptcy was not complete, yet after that notice the defendant was not warranted in paying the money over to the bankrupt, and it cannot be called a *bond fide* payment."

Buller, J. "With regard to the second point: whether this be considered on the construction of the bankrupts laws, or on the cases adjudged, I have not the smallest doubt but that the bankruptcy relates to the day on which the bankrupt was arrested; and the court are bound to consider it so, and reason upon it as such. The other objection as to the form of the action seems to have been decided by the case of *Hitchin v. Campbell*, (a) which says, that the assignees have their election to bring either *trover* or *assumpsit*. But without entering into the cases upon that subject, I should be disposed to support the latter. For that is most beneficial to the defendant; because in *trover* the plaintiff may recover the full value of the goods though the sale may not actually have produced more than half their worth; but in *assumpsit* the assignees are only entitled to recover what the party really received, which

(a) Ante 480. n. y.

is only what the sale of the goods produced. But even supposing there had not been any other case upon this subject, there could be no doubt in this case; for the letter written by the defendant in answer to one from the plaintiff's attorney is decisive that this action will lie. For, first, he had notice that the bankrupt was in insolvent circumstances, that he was in gaol, and that the goods did not come into his possession till after the arrest; to which he returned for answer that as he had advertised and begun the sale, and the goods would not produce the sum for which the bankrupt was in prison, he had thought it better to complete the sale, and that he had sold the effects without any design to defraud. Now this is as much as if he had said, that it was most beneficial for him that the goods should be sold, but that he would hold the money for those who are really entitled to it."

So, in the case of *Smith* and another assignees of *R. Drake* and *Ebenezer Goddard v. William Goddard*, (b) which was an action of *assumpsit*. The first count of the declaration stated, that the defendant, before *R. Drake* and *E. Goddard* became bankrupts, was indebted to the said *R. D.* and *E. G.* for money had and received to their use, and being so indebted, promised to pay, &c. The second count stated, that after the bankruptcy of *R. D.* and *E. G.* the defendant was indebted to the plaintiffs, as assignees, for money had and received to their use as such assignees, and being so indebted promised to pay, &c. There was also a third count, on an account stated between the plaintiffs, as assignees, and the defendant. The defendant pleaded *non assumpsit*, and gave a notice of set-off. At the trial before Lord *Alvanley*, Ch. J. it appeared that *R. Drake* and *E. Goddard* carried on business in partnership; that *E. G.* committed an act of bankruptcy, on the 8th of *February*, 1802, and *R. D.* on the 17th of the same month in the same year; that a few days previous to the first act of bankruptcy, a large sum of money was paid into the house on account of the defendant; that between the 8th and 17th of *February* several sums of money amounting to 558*l.* were paid to the defendant by a clerk of the house in consequence of the former insisting on such payment, there being evidence to show that he was acquainted with the insolvent situation of that house; that on the 28th of *February* 5*l.* more were paid to the defendant;

(b) 3 *Bos. & Pul.* 465.

that up to the 17th when *R. D.* became bankrupt, the balance of accounts between the partnership and the defendant continued to be in favour of the latter, and that the trade continued to be carried on by the bankrupts till the 15th of *March*. The plaintiffs were assignees under a joint commission against *R. Drake* and *E. Goddard*.

The counsel for the defendant made two objections; first, that neither of the counts in the declaration was so framed as to entitle the plaintiffs to recover, because the money being paid to the defendant after the act of bankruptcy committed by *E. Goddard*, but previous to that committed by *R. Drake*, the defendant was not indebted to the partners before their bankruptcy, as alleged in the first count, nor to the assignees after the bankruptcy of both, as alleged in the second count, for *R. Drake* being solvent when the money was paid to the defendant, it was money received by the defendant to the use of the plaintiffs, as assignees of *E. Goddard* and to the use of *R. Drake*. Secondly, that as the balance, when *R. Drake* became bankrupt was in favour of the defendant, the assignees could not recover on any demand prior to *R. Drake's* bankruptcy, since the 5 Geo. 2. c. 30. s. 28. directs the assignees to strike a balance when there have been mutual debts or credits, and that balance must be taken at the time when both partners become bankrupts, and that at all events therefore, the defendant must be allowed the money received by the bankrupts on his account, before the bankruptcy of either.

The court determined that the declaration did not embrace the whole cause of action; and that the plaintiffs could only recover the sum of five pounds thereon.

Lord *Alvanley* Ch. J. delivered the opinion of the court as follows: " This is an action for money had and received, brought by the plaintiffs as assignees of two persons in partnership, and the money in dispute was paid by the person who acted as clerk in the partnership concerns after an act of bankruptcy committed by one of the persons, but before an act of bankruptcy committed by the other. With respect to the *5l.* paid after the bankruptcy of both, the plaintiffs are clearly entitled to a verdict for that sum; and the only question we have to decide is, whether the assignees can recover the money in dispute under a count for money had and received to the use of the plaintiffs, as assignees of both parties? We are of opinion, that in this case it is not possible to contend with

with success, that the plaintiffs ought to recover in the way in which they have declared. No doubt the plaintiffs are joint assignees of both the partners, and as such they might have sued for money had and received to the use of each; and if there had been a count for money had and received to the use of the plaintiffs as assignees of the partner who had committed an act of bankruptcy at the time the money was paid, they might perhaps have recovered one moiety. On this, however, we do not mean to give an opinion. It is clear that after the bankruptcy of *Godard*, the clerk was the agent of such persons as should be chosen assignees of his estate, as well as of *Drake*, who was then absent. But we think that upon the present declaration there is no pretence for saying that the plaintiffs ought to recover."

So, in the case of *Vernon* and others assignees of *Elizabeth Tyler*, a bankrupt, v. *Hankey* and others, (c) it was held that bankers are liable for money paid upon the drafts of a bankrupt out of cash in their hands belonging to the bankrupt, after notice of an act of bankruptcy committed by him.

But where the assignees of a bankrupt have recovered (by a judgment) from the bankers, the money which they had so wrongfully paid over, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy; the assignees having refused to permit the bankers to set off this payment in the action brought against them.

Thus, in the case of *Vernon* and others assignees of *Elizabeth Tyler* a bankrupt, v. *Hanson*, (d) which was also an action of *assumpsit* for money had and received. The facts were these: The defendant had received 1090*l.* being the amount of a draft drawn in his favour for a *bona fide* debt by the bankrupt on Messrs. *Hankeys*, her bankers, which money was received by the defendant after notice of the bankruptcy. In the case above referred to, the plaintiffs had recovered a large sum against the *Hankeys* for money belonging to the bankrupt received by them, in which action they attempted to set off this as well as several other sums which they had paid on the bankrupt's account: but

(c) 2 Term Rep. 113.

(d) 2 Ibid. 287.

it appearing that they had paid those sums with full knowledge of the bankruptcy, the set-off was disallowed.

The court were of opinion that the plaintiffs having once recovered this sum from the Messrs. *Hankeys*, they could not recover it a second time against the defendant.

Albhurst, J. said: "It is admitted very properly, that the plaintiffs cannot affirm and disaffirm the same transaction: then try this question by that test. This was no specific money of the bankrupt paid to the defendant; it was only a payment in the common course of business by her bankers who had, prior to that, received large sums of money belonging to the bankrupt: The plaintiffs first brought an action against the bankers for all the money received by them on the bankrupt's account, against which demand they offered to set-off this as well as several other sums which they had paid on account of the bankrupt; to this the assignees objected, insisting that those payments were made with their own money, and not with that of the bankrupt. But in the present action they say it was a payment with the money of the bankrupt; and, the defendant having received it with knowledge of the bankruptcy, they insist that they have a right to recover it back. It has not been attempted to be disputed but that the defendant was a *bonâ fide* creditor of the bankrupt; and a payment by her to him, although with notice of the bankruptcy, would have been good as against all persons but the general creditors. If therefore he do no injury to the creditors, he does not hold it against conscience. The bankrupt's estate has not been injured at all by this payment; for the assignees have already received this sum from the *Hankeys*, then they say that they have a right to bring this action against the defendant, because otherwise the *Hankeys* cannot recover it back. But the *Hankeys* paid this sum, knowing of the bankruptcy, and perhaps have no right to recover it back. But that is immaterial as far as it respects the assignees; they are now interposing between two creditors in a case in which the general body of creditors have no concern."

So, where a policy broker pays a sum of money of *his own* on account of his principal, a bankrupt, to a trader who held certain policies of assurance of the bankrupt, which had been delivered to him after a secret act of bankruptcy in satisfaction of a just debt, the assignees cannot recover the money so paid, though the broker

in settling his account with the assignees, retained the amount of the money paid.

Thus, in the case of *Hovil* and others, assignees of *Wardell* a bankrupt, v. *Pack* and another, (c) which was an action of *assumpsit* for money had and received by the defendants, to the use of the plaintiffs, as assignees of *Wardell* a bankrupt. At the trial a verdict was found for the plaintiffs for 230*l.*, subject to the opinion of the court of *King's Bench* on the following case :

In *November* 1802, *Wardell*, being a trader, indorsed a bill of exchange which would become due on the 8th of *February* 1803, and which, in *December* 1802, was indorsed over to the defendants for a valuable consideration. On the 27th *January* 1803 *Wardell* sailed in a ship, of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of bankruptcy. The bill was refused payment when due, and notice thereof given to the proper parties. In *July* 1803, the bankrupt's wife caused insurances to the amount of 3400*l.* on the ship and cargo to be effected for the bankrupt by *Mr. De Beaume*, a policy broker residing in *London*, and who delivered them to *Mrs. Wardell*, without being paid the premiums. *Mrs. Wardell* soon afterwards applied to the defendants, whose debt was still unpaid, and who had brought an action against the drawer of the bill, abovementioned, and obtained judgment by confession in such action, to take another bill for payment of the amount of the first, which she indorsed as attorney for her husband, and to stay execution, until such second bill should become due: and as an inducement to them to do so, offered to deposit the policies with them as a security for the payment of such second bill. This the defendants agreed to, and the policies were accordingly deposited with them. In *July* 1803, the ship and cargo were captured by the *French*. On receiving intelligence of the capture, *Mrs. Wardell* applied to the defendants to deliver up the policies, for the purpose of receiving the amount of the subscription; but they refusing to do this without security for the payment of their debt, (the second bill having also been dishonoured,) *De Beaume*, at her request, accepted a bill of exchange at one month for 230*l.* the amount of the defendant's debt; and the policies upon this were, at

the request of Mrs. *Wardell* delivered up to him. This bill was regularly paid, when due by Mr. *De Beaume*, who had received the amount of the policies of insurance from the underwriters. The bankrupt returned to *England* in *February* 1804; and on the 9th of *March* following a commission of bankrupt was issued against him, under which the plaintiffs were chosen assignees, and an assignment to them was regularly executed. *De Beaume* retained from the plaintiffs as assignees, out of the monies he had collected on the policies, the amount of the payment he had made to the defendants. *Wardell* had been a bankrupt twice before, once in the year 1786, and again in 1788, and had obtained his certificate under each of those commissions, but had not paid a dividend of 15s in the pound under the last, and his creditors at that time still remained unsatisfied. The question for the opinion of the court was, whether the plaintiffs were entitled to recover? The court were of opinion that the plaintiffs were not entitled to recover. And Lord *Ellenborough*, C. J. said "If you adopt *De Beaume*, as your agent on your own behalf, you must adopt him throughout, and take his agency *cum onere*. Your action, if any, must be against *De Beaume*; but it is impossible you can follow the money into the hands of the defendant, to whom it has been paid by your adopted agent. If this could be done, by the same rule you might follow it still further through other hands. But if the defendants had paid it over to another, could you pretend to have the same right to follow it."

Lawrence, J. "The facts are, that the defendants having a demand upon the bankrupt upon a certain bill, his wife prevailed upon him to give it up, and to take another bill for the amount, and deposited the policies of insurance, which she had procured from *De Beaume*, in their hands as a security. When she applied to them to deliver up the policies, for the purpose of obtaining payment from the underwriters, they refused unless upon receiving security for the payment of their debt. This security was given by *De Beaume's* acceptance, which he afterward paid: the money therefore, which the defendants have received, and for which the assignees of the bankrupt have brought this action, was the money of *De Beaume*, and not of the bankrupt; and therefore the assignees can have no title to recover it."

Le Blanc, J. "*De Beaume* must have paid his acceptance to
the

the defendants, whether he had ever received the amount of the loss on the policies from the underwriters or not. The payment was therefore made by him out of his own money."

So, an action for money had and received will not lie at the suit of assignees to recover the value of *India* stock re-transferred by a trader after his bankruptcy to a person who intrusted him with it for the purpose of voting. (f) For^{her L. Mansfield} it is a new species of property arisen within a few years, it is not money; perhaps an action might be framed so as to come at the justice of the case, but an action for money had and received will not lie in this case where no money was received."

If the assignees sue upon a contract made by a bankrupt before his bankruptcy, they are bound by all the conditions annexed to it.

Thus, in the case of *Dobson* and another assignees of *Patrick v. Lockhart*, (g) which was an action of *assumpsit*, for goods sold and delivered by the bankrupt, before his bankruptcy, to the defendant. It appeared that on the 11th *October* 1788, the bankrupt and the defendant became bound to *S. Nicholson*, and two other persons, in 900*l.* conditioned to pay 450*l.* with lawful interest on demand; that on the 16th *May* 1789, the bankrupt, one *Foster*, and the defendant, became bound to *J. Wakefield* and two other person in 1000*l.* conditioned to pay 500*l.* on interest, on the 1st of *June* 1789; that those two bonds were executed by the defendant as a surety for the bankrupt, and for his debt only; that before the bankruptcy of *Patrick*, viz. on the 21st of *May* 1789, it was agreed between the defendant and the bankrupt, that in order to indemnify the defendant against these two bonds, the latter should become bound to the former in 1400*l.* conditioned to pay 700*l.* with interest on the 13th of *February* 1790, and as a further indemnity, that the defendant should retain and keep such money, not exceeding the money to be secured by the last bond, as should at any time be due from *G. L.* and the defendant to the bankrupt in respect of any dealings between them in trade, until the two first bonds should be satisfied, and that the defendant should, out of the money which should be due from *G. L.* and himself to the bankrupt, retain and set off so

(f) *Nightingal v. Devisme*, 5 Bur. 2589. See also *Jones v. Brinley*, 4 East Rep. 1. (g) 5 Term Rep. 133.

much money, not exceeding the last bond, as he should at any time pay on the two first bonds.

The court held that the assignees were bound by this agreement, and gave judgment for the defendant.

Lord *Kenyon*, Ch. J. said: "This is an action for goods sold and delivered by the bankrupt to the defendant; and the question is, whether the plaintiffs, who are the assignees of the bankrupt, have a right, under all the circumstances of the case, to exact payment for the goods. The defendant had various transactions with the bankrupt; among others, he became security for him in two several sums of money; and at the time of becoming such security the latter engaged that the defendant should not be called upon to pay for the goods until he was indemnified against those bonds. That agreement having been proved, I see no objection to it in point of law; I think it is a good defence to this action under the general issue, and that the defendant need not have pleaded it specially. The consequence is, that the plaintiffs have brought this action to enforce payment of a sum of money which the defendant is not bound either in law or conscience to pay under these circumstances."

9. *Of an Action at Law by Assignees for Money or Goods of a Bankrupt attached in a Foreign Country by a Creditor residing in England, after Notice of the Assignment, &c.*

If a creditor, residing in *England*, with full knowledge of the bankruptcy of the debtor, attach money of the bankrupt's abroad the assignees may recover it back by action of *assumpsit* for money had and received.

Thus, in case of *Hunter* and others assignees of *Blanchard & Lewis*, bankrupts, v. *Potts*, (b) which was an action of *assumpsit* for money had and received, to which the defendant pleaded the general issue. On the trial a special verdict was found, which, after setting forth the formal parts, (namely, the trading, the petitioning creditor's debt, the bankruptcy, the commission and assignment,) stated, that the bankrupts before their bankruptcy were indebted to the defendant on a contract made

(b) 4 Term Rep. 182. 2 H. Bl. 402. S. P.

in *England*; at which time, and also at the time of the bankruptcy, and until the assigning of the attachment hereafter mentioned, all the parties were resident in *England*; that after the issuing of the commission of bankrupt and the making the assignment, the defendant, knowing thereof, gave orders to his attorney, in *Rhode Island, North America*, to attach the effects of the bankrupts in that island, in consequence of which the attorney in *May 1785*, attached in the regular way, certain monies in the hands of *J. and W. Russell*, which were due from them to the bankrupts at the time of the bankruptcy; and in *November 1786*, obtained in the Court of *Common Pleas in Rhode Island*, a regular judgment against the bankrupts for 496*l.* 12*s.* 9*d.* and costs; which sum he afterwards received, and remitted to the defendant in *England*, who claims to hold the same to his own use. The verdict also stated that the proceedings of the Court in *Rhode Island* were continued by imparlances from *May 1785* to *November 1786*, at the request of the *Russells*, in order that the bankrupts might have notice of such proceeding.

Lord *Kenyon*, Ch. J. delivered the opinion of the court in favour of the plaintiffs. He said: "In the argument on this case many quotations were made from the writers on the civil law, which it is not necessary to consider in determining this question. Generally speaking, it must be admitted that personal property must be governed by the laws of that country where the owner is domiciled. Neither do we mean to break through the rule that the courts of one country ought to pay a proper deference to the decisions of the courts in another, having competent jurisdiction, where the facts on which the decision was made were fairly disclosed to such court. But the general question here is whether the assignment, which was executed by the commissioners of the bankrupt was sufficient to vest the bankrupt's property in the plantations abroad, in the assignees under the commission; because if it did so vest at the time of the assignment, it is immaterial to consider in this case how far the relation under the bankrupt laws should take effect in *Rhode Island*, since the assignment was executed anterior to the time when the attachment suit was there commenced. Therefore the only question here is, whether or not the property in that island passed by the assignment, in the same manner as if the owner (the bankrupt) had assigned it by his voluntary act. And that it does so pass cannot be doubted, unless there were sum positive

positive law of that country to prevent it. Every person having property in a foreign country, may dispose of it in this: though indeed if there be a law in that country directing a particular mode of conveyance, that must be adopted; but in this case no law of that kind is stated, and we cannot conjecture that it was not competent to the bankrupt himself, prior to the bankruptcy, to have disposed of his property as he pleased. Now the bankrupt statutes have expressly enacted that the commissioners may assign all the property of the bankrupt in the most extensive words; and therefore on the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country where personal property may happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt resident here, though such property be in a foreign country,"—Judgment was accordingly given for the plaintiffs.

So, in the case of *Sill and others v. Worfwick*, (i) it was determined, that if after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of debt in *England*, by virtue of which he attaches, and receives, after the assignment, money due to the bankrupt in the *West Indies*, the assignees may recover it back in an action for money had and received.

10. *In what Cases the Assignees of a Bankrupt are liable to an Action of Assumpsit for Rent, and for Money Had and Received, &c.*

Assignees may either affirm or disaffirm the contract of a bankrupt (k). If they affirm it, they must be bound by the transaction in the same manner as the bankrupt himself would have been. But if they disaffirm the contract they are not liable to be charged, though it come to them by the general assignment: therefore the assignees are not liable to be charged for rent of premises assigned to them, unless they take possession (l).

(i) 1 H. Bl. 665.

(k) Per. Lord Kenyon, 4 Term Rep. 217.

(l) *Bourdillon v. Dalton and others*, Peake's Cas. N. P. 238.

So, where a tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year, the lessor cannot maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy during the time that elapsed before the bankruptcy.

Thus, in the case of *Naisb v. Tatlock* and others, assignees of *Lidiard*, a bankrupt, (m) which was an action of *assumpsit* for use and occupation. Upon the trial a verdict passed for the plaintiff, subject to the opinion of the court of Common Pleas, on the matter of law arising upon the facts found by the jury, considered with reference to the declaration as follows: "It was stated in the first count of the declaration, that the defendants were indebted to the plaintiff, in seventy pounds, for the use and occupation of certain apartments in his house, before that time used, occupied, possessed, and enjoyed, as well by one *Thomas Lidiard*, whose term and estate therein the defendants afterwards had, as by the defendants, at their special instance and request, for one year then elapsed, from and under and as tenants thereof respectively to the plaintiff, and by her permission; and being so indebted they promised to pay. The second count was upon a *quantum meruit*, in consideration that the plaintiff at the like special instance and request of the defendants had permitted the said *Thomas Lidiard*, whose estate, term and interest the defendants had, as well as the defendants themselves respectively, to have, use and occupy the same apartments, and that *Lidiard* and the defendants respectively had accordingly had, used, and occupied, the same for a year, by such permission of the plaintiff. The material facts of the case were that after *Lidiard* had occupied those apartments, for a certain part of the year, under an agreement to pay seventy pounds a year for them, he became a bankrupt, and the defendants, who were his assignees, then entered into possession and continued in the occupation of them for the rest of the year, and that after the expiration of the year. Mr. *Tatlock* one of the defendants wrote the following note to Mr. *Ward* the solicitor for the commission of bankrupt against *Lidiard*; "Mr. *Tatlock's* respectful compliments to Mr. *Ward*, the bearer is a

(m) 2 H. Bl. 319.

"Mrs.

“ Mrs. *Naisb* a widow lady, whom Mr. *Lidiard*. rented his house
 “ in *Austin Friars* of; there is due to her for rent fifty pounds,
 “ we having paid her twenty pounds since the commission; there
 “ is also five pounds fifteen shillings and sixpence for coals, like-
 “ wise for our use since the commission; now I wish you to give
 “ an order upon Mr. *Tatlock* for the above, as we certainly are
 “ bound to pay her. *London, 20th July, 1792.*” This paper was
 delivered to Mrs. *Naisb*, the plaintiff, by *Tatlock*, to be delivered
 to *Ward*; and it was delivered; but some dispute arising, the fifty
 pounds were not paid, in consequence of which this action was
 brought, and then a proportion of the annual rent of seventy
 pounds for that part of the year, during which the defendants were
 in the occupation of the premises, was paid into court. Upon
 this state of facts, it was insisted on the part of the defendants,
 that the plaintiff had not proved her case stated in the declaration.
 The question was saved for the opinion of the Court, after it had
 been left to the jury to say distinctly, whether the agreement was
 or was not to pay the rent annually, which they found in the affir-
 mative; and whether the seventy pounds mentioned in the note
 of the 20th *July 1792*, was the year’s rent, or was a sum which
 the defendants had agreed to pay for their own occupation; as to
 which the jury found, that it was the rent for the whole year,
 including the time of *Lidiard*’s occupation.”

The Court determined that the evidence on the part of the
 plaintiff was not sufficient to maintain the action.

Lord Ch. J. *Eyre* said: “ It is stated in both the counts of the
 declaration, that plaintiff’s demand is founded upon a use and oc-
 cupation by *Lidiard* for a part of the year, and by the defendants
 for the residue of the year, both occupations being had by the per-
 mission of the plaintiff, at the special instance and request of the de-
 fendants. These latter words, often mere words of form, are here
 words of substance and operative, connecting the occupation of the
 defendants for which they were bound to make a satisfaction, with
 the occupation of *Lidiard* a stranger, for whose occupation, *prima*
facie at least, the defendants were not bound to make a satisfac-
 tion. In point of fact it was not at the request of the defendants
 that *Lidiard* was permitted to occupy; the defendants had no
 relation to *Lidiard*, but as his assignees; and that relation did not
 commence till the close of his occupation; that relation therefore
 alone could not have the effect of making them personally liable

to answer for his occupation before his bankruptcy. The averment that he had been permitted to occupy at the request of the defendants, is therefore substance, and not mere form, and a failure in the proof of it is fatal. The framer of this declaration seems to have been aware of this difficulty, and to have endeavoured to obviate it by throwing into the declaration the words "whose term and estate therein" in the first count; and the words "whose estate term and interest" in the second, the defendants had. This very loose and general averment seems to have been calculated to facilitate the passage of the other averment "*of the defendant's request*" through the cause at *nisi prius*, and if it had passed smoothly there, would probably have been the averment which would have been relied upon after a verdict, and this last would have been discarded. Loose, informal and indistinct as it is, it might serve to introduce at the trial, that *Lidiard* was a tenant for a year at a rent of seventy pounds, payable at the end of the year, and that the assignees having entered into possession as assignees, entered under that demise, and became assignees of the lease, and bound to pay the rent which became due after the assignment. It might then be with great colour urged, that rent due is recoverable in an action for use and occupation, and if the rent is really due, the manner of stating the use and occupation seems to have more form than substance in it. I was for a time inclined so to consider the case, but upon further consideration of the nature of the action on the case for use and occupation, and of the scope and purview of the statute 11 Geo. 2. c. 19. we are of opinion, that the circumstances under which the defendants succeeded to the occupation of the premises, will not prove or dispense with the proof, that *Lidiard's* occupation, was at the request of the defendants. The action for use and occupation, is in its own nature collateral to the action on a contract for rent upon a demise, and it was so holden in the case of *Johnson v. May*, 3 Lev. 150: if the defendant did in fact use and occupy by the permission of the plaintiff, and had expressly promised to pay, though the plaintiff had no title, or perhaps an equitable title only, the action lay.

Under the statute a landlord, who has rent owing to him, is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises, which have been holden and enjoyed under the demise, by the action for the use and occupation; and it is provided on his behalf, that if the demise be produced against him, it should not defeat his action, as it would have done before the statute, but
the

the fixed rent shall only be used as a medium, by which the uncertain damages to be recovered in this form of action shall be liquidated. What is given by this statute? A reasonable satisfaction for the use and occupation is the thing intended to be given; the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise) is the proper form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction, which in its own nature must apply to something specific, by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy, which in its own nature is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the act to make this remedy co-extensive with all the remedies for the recovery of rent, claimed to be due by the mere force of the contract for rent. The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. In the case now under consideration, the plaintiff must be left to such other remedy as she may be advised to pursue: she cannot recover in an action for use and occupation without proof of the use and occupation alledged; and if she can recover at all in this form of action, against one man for use and occupation by another, (as to which we give no opinion) it must be upon the ground of that occupation having been permitted at his request, and that request must be proved. The consequence is that a non-suit must be entered, and the *posse* delivered to the defendants."

If assignees receive money arising from property delivered to the bankrupt for a particular purpose, and which was in his possession at the time of his bankruptcy, such money may be recovered from them in an action of *assumpsit*.

Thus, in the case of *Scott* and others, v. *Surman* and others assignees of *Richard Scott* a bankrupt (*n*) which was an action of *assumpsit* for money had and received. The plaintiffs being partners beyond sea consigned a quantity of tar to *Richard Scott*, the bankrupt, brother of the plaintiff *Scott*, as their factor. There had been mutual dealings between the two brothers, which were then unsettled. The ship and goods arrived in the *Thames* from *Carolina*, 22d March 1739. Their factor received the bill of lading,

(*n*) *Willes Rep.* 400. See also *Zinck v. Walker*, 2 *Bl. Rep.* 1154. *S. P.*

and following, to *Cornelius and Jeremiah Owen*; and it was agreed that the tar should be paid for in promissory notes payable four months after the delivery of the goods, and that a debt of 31*l.* due from the factor to the vendees on his own account should be deducted. 1st *April* 1740, the vendees gave the factor in part two promissory notes, one for 66*l.* 13*s.* 4*d.*, the other for 102*l.* 6*s.* 8*d.* which with the 31*l.* made up 200*l.* On the 3d *April* 1740, the factor committed an act of bankruptcy, and a commission issued on the 5th on the petition of one of the defendants. The bankrupt delivered up the two notes to them as assignees, and they afterwards received the money. They had likewise confirmed the sale, and settled the account with the vendees, and received the balance, being 378*l.* 14*s.* They also received the bounty money allowed by act of parliament to the importers, being 299*l.* 8*s.*

The defendants insisted that, as assignees, they were entitled to all the money which they had received, and that the plaintiff's should come in as creditors under the commission.

The court, however, were of opinion that the plaintiffs were entitled to recover the sum of 327*l.* 10*s.* deducting the 31*l.* for which the plaintiff's could only come in as creditors

Lord Ch. J. *Willes* in delivering the opinion of the court, said: "We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiff's could not have recovered any thing in this action, but must have come in as creditors under the commissioners, as is laid down in the case of *Whitcomb, v. Jacob*, 1 *Salk.* 161, and in many other cases. But the reason of this is so very plain that I need not cite any other, because money has no ear-mark and therefore cannot be followed.

We are likewise all agreed that if the goods had remained in specie unsold in the bankrupt's hands at the time of the bankruptcy, the plaintiffs might have recovered them in an action of trover, and that they could not be applied to pay the bankrupt's debts, according to the case of *L'Apostre v. Le Plaistrier*, cited in 1 *P. Wms.* 318, adjudged in B. R. M. 1708. The case indeed of *Wise-man v. Vandeput*, 2 *Vern.* 203. seems to imply the contrary: but

it does not appear by that case whether the goods were consigned to the bankrupt, as the buyer, or only as a factor; and besides the case of *L'Apoffre* and *Le Plaistrier*, which is long since, has determined the contrary. But the present case is a middle case between these two which I have mentioned, but I think may be determined on the same reasons. For why are goods considered still as the owners? because they remain in specie, and so may be distinguished from the rest of the bankrupt's estate. But as money has no ear-mark, it cannot be distinguished. Otherwise to be sure, in reason, the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt, it is equally distinguishable; or if it be laid out in a particular thing, as the case in *Salkeld* is. And the notes are within the same reason. And we do not only found ourselves on the reason of the thing but on several cases which have been adjudged.

The general rule is, that if a man receive money which ought to be paid to another or to apply to a particular purpose to which he does not apply it, this action will lie as for money had and received, &c. So held in *Owen* 86, that if money be delivered by A to one to buy a horse or any other thing, if he do not lay out the money accordingly, an action of debt will lie or an action on the case for so much money had and received to A's use. So in *1 Salk. 9. Poulter v. Cornwall*, if a man receive money for a special purpose and neglect or refuse to apply it to the uses for which he received it, an action on the case will lie as for money had and received. And though a bill in equity may be proper in several of these cases, yet an action at law will lie likewise; as if I pay money to another to lay out in the purchase of a particular estate or any other thing, I may either bring a bill against him, considering him as a trustee, and praying that he may lay out the money in that specific thing, or I may bring an action against him as for so much money had and received for my use. Courts of equity always retain such bills when they are brought under a notion of a trust, and therefore in this very case, have often given relief where the party might have had his remedy at law, if he had thought proper to proceed that way.

To apply this general rule to the present case. The assignees having received this money which belongs to the plaintiffs, and ought not to be applied to pay the bankrupt's debts, they ought to have paid it to the plaintiffs, and not having done so, this action will

will lie against them for so much money had and received to the use of the plaintiffs. But I need not rely on the general rule only, for this very point now in question has been twice solemnly determined. First in the case of *Gurrat v. Cullum*, T. 9 Anne, B. R. Bul. N. P. 42, which was thus. The plaintiff being in Ireland, employed *Burtwell* and *Mason* as his factors in London to sell goods for him, which he had sent to them. They sell a parcel to J. S. for 20*l.* the plaintiff not knowing to whom they were sold, nor J. S. whose goods they were; but they were delivered to him as the goods of B and M by a bill of parcels, and charged to their account in their books mutually. B and M before payment became bankrupts, and their debts are assigned by the commissioners to the defendant, who afterwards receives the 20*l.* of J. S. The plaintiff brought an action for *money had and received* to his use; and this matter being referred by *Holt* for the opinion of the *King's Bench*, judgment was given on argument for the plaintiff. Afterwards at Guildhall before Lord Chief Justice *Parker*, this case was cited and allowed to be law, because though it was agreed that payment by J. S. to *Burtwell* and *Mason*, with whom the contract was made, would be a discharge to J. S. against the principal, yet the debt was not in law due to them, but to the person whose goods they were; and therefore it was not assigned to the defendant by a general assignment of their debts, but remained due to the plaintiff as before; and being paid to the defendant, who had no right to have it, it must be considered in law, as paid for the use of him to whom it was due, and so an action will lie as for money had and received to his use."

So in the case of *Tooke v. Hollingworth and others assignees of Daniel*, (n) which was an action of *trover*, for three bills of exchange, and a certain quantity of guineas. A special verdict was found, stating, That two years before the bankruptcy of *Daniel*, it was agreed between the plaintiff, a merchant residing at *Manchester*, and *Daniel* then of *London*, a goldsmith, that the latter should purchase of the former all the light gold coin of this realm, which the plaintiff should send from *Manchester* to *Daniel* in *London*, at a certain stated price to be paid by *Daniel*, to wit, at the rate of 20*s.* 11*d.* for each guinea; and that the plaintiff should from time to time draw bills of exchange upon *Daniel*, for the money due to the plaintiff upon such sale of the light gold, which bills should

(n) 5 Term Rep. 215. 2 H. Bl. 501. S. C. in error.

be made payable at the end of two months from the respective dates thereof; and that *Daniel* would also from time to time accept other bills of exchange, drawn by the plaintiff for his own convenience; but in such case the plaintiff should remit value to *Daniel* to the amount of such acceptances, to answer together with the light gold for the different bills so drawn on *Daniel*; by reason of which agreement an account subsisted between them, upon which, at the time of the bankruptcy of *Daniel* herein after mentioned, *Daniel* was under acceptances for the plaintiff, in the course of their dealings under the contract, to the amount of 873*l.* 7*s.* 6*d.* which sum exceeded the value of all the gold and bills remitted by the plaintiff to *Daniel*, including the gold and bills in the declaration mentioned. Independently and exclusively of the said acceptances upon the balance of the said account, *Daniel* at the time of his bankruptcy was indebted to the plaintiff in 53*l.* 7*s.* 7*d.*; and none of the bills so accepted by *Daniel* for the plaintiff, at the time of the sending of the money and three bills of exchange hereafter mentioned, were due or payable. The plaintiff being possessed of the three bills of exchange in the declaration mentioned, (the same being then unpaid, and of the value, &c. therein mentioned) and also of the 213 light guineas, and 19 light half guineas, as of his own bills of exchange and monies, in pursuance of the said agreement so made with *Daniel*, and in order to enable him to pay the said bills so accepted by him for the plaintiff, when they should become due, (and being then wholly ignorant of *Daniel*'s being a bankrupt as hereafter is mentioned) late of the evening of the 19th of *July* 1791 sent by the mail-coach at *Manchester*, which goes from thence to *London*, the said bills and money, in the said declaration mentioned, in a box directed for *Daniel*, and paid the carriage thereof; which bills set out from *Manchester* for *London* early in the morning of the 20th of *July*, and the monies were then and there partly cut, and partly uncut, and the plaintiff of the same day, by the same mail, also sent a letter addressed to *Daniel*, in which he advised *Daniel* that he had sent to him the money and bills mentioned in the declaration, and transmitted to him an account of some light gold and bills which he had sent on a former day, and also an account of the bills drawn by the plaintiff on *Daniel* (in number six) since his last letter, a few days before. None of the drafts so advised to be drawn upon *Daniel* by this letter were ever accepted by him. The letter and box containing the three bills of exchange and monies, afterward on the 21st of *July*, were delivered

vered to one *Joseph Heathcote* (the messenger under the commission) at *Daniel's* house in *London*, the messenger having been in possession from the 19th of *July* of the house and of the goods and effects of *Daniel*, and the messenger paid the portorage for the same. The verdict then stated that *Daniel* had committed an act of bankruptcy on the 6th of *July* 1791, by absconding; that the commission issued on the 19th of *July*, on which day at 3 o'clock in the afternoon, *Daniel* was declared a bankrupt; that on the 30th of *July* the assignment was made to the defendants, after which the messenger delivered the bills and guineas to the defendants, who at the time within mentioned, as such assignees, &c., refused to deliver the same upon demand to the plaintiff, and converted, &c. That after the commission issued, and before any of the bills drawn by the plaintiff and accepted by *Daniel* were paid by *Daniel* or by the defendants, or presented to them for payment, and before the conversion above stated, the plaintiff paid the amount of them the several holders; and that *Daniel's* estate was thereby wholly exonerated therefrom. And that the plaintiff was wholly ignorant of *Daniel's* bankruptcy until after the delivery of the bills and money to the defendants.

The Court of *King's Bench* gave judgment for the plaintiff: but Mr. Justice *Buller* dissented from this judgment. A writ of error was afterwards brought into the *Exchequer Chamber*, where, after two arguments at the bar, the judgment of the court of *King's Bench* was affirmed, and Lord Ch. J. *Eyre*, in pronouncing the judgment of the *Exchequer Chamber*, said (o): "We are all of opinion that this judgment ought to be affirmed. I shall state very shortly the reasons which have induced me to concur in that opinion. The right of the parties to the light gold and bills, which are the subject of this action, appears to me to depend principally upon the true construction of the original agreement between *Tooke* and *Daniel*, made two years and upwards before the bankruptcy. That agreement consisted of two parts; one being a contract for a bargain and sale of light gold by *Tooke* to *Daniel* at a given price, to be paid for by bills of exchange, payable at two months, a simple and unembarrassed transaction; the other being a contract, the effect of which was that *Daniel* should become *Tooke's* banker, that he should accept his bills, *Tooke* remitting value to the amount of

(o) *Vide* 2 H. Bl. 501.

such acceptances, in bills and in light gold. That is plainly the effect of the latter part of the agreement. They might have dealt as mere merchants, the one selling and the other buying this article of light gold, and paying for it according to agreement. And had this been a case of that kind, the transaction would have had one complexion, and the argument upon it, I think, would have taken one course. But as they might act in that manner, so they might upon the latter branch of the agreement act as principal and factor, or principal and banker, and not as mere merchants; and the idea of bargain and sale would enter no farther into their transactions upon that branch of the agreement than merely as it went to fix the price at which the light gold, which should be remitted from time to time, should be carried to the account of *Tooke* as cash, and be applied by *Daniel*, as *Tooke's* agent, in payment of the acceptances which he had made on the credit of *Tooke*. There would certainly be this mixture of bargain and sale in any transactions which should take place even under the latter branch of the agreement, which in other respects would be the transaction of principal and factor, or principal and banker. But though there be this mixture, yet I think the case of the light gold cannot, in respect of that circumstance, be separated from the case of the bills. If *Daniel* was to be considered as a factor or banker only with respect to the bills, which should be remitted, he ought to be considered as banker or factor only, as to the light gold, with an agreement on his part to apply that light gold in payment of his acceptances, at the rate fixed in the former part of the agreement. In a word, the bargain and sale of the light gold, when considered under the second branch of the agreement, as a remittance to pay the acceptances, is but an incident in the business of the principal character of factor or banker. Now if it can be established, that *Tooke* and *Daniel* acted in the characters of principal and factor, their respective rights of property are very easily ascertained; the general right of property would be in *Tooke*, the special right of property in *Daniel*, to enable him to execute the commission with which *Tooke* had intrusted him; and he would also have a lien as against the general property of his principal, for the balance of his account. In this way of considering the case, we may lay all this story of the bankruptcy intirely out of the question. For suppose *Daniel* had remained solvent, *Tooke* might, at any time, have paid him his balance including any acceptances he might be under, and have withdrawn his effects out of *Daniel's* hands; and there

there could have been no room for a question between them but merely as to the profit upon the light gold estimated at the price in the agreement. Now I think that would depend on the question, whether the light gold was sold under the first part of the agreement, or whether it was to be considered as a mere article of remittance under the latter part; and according to my view of the case, I think that question would be decided against *Daniel*. The assignees standing in the place of *Daniel* certainly can be in no better condition than *Daniel* himself. The ground I have taken is very distinctly marked, and very well enforced in the argument of one of the Judges of the Court of *King's Bench* (p). He concludes somewhat differently from me, but the ground work is there. In my opinion it may be sustained, it steers clear of all difficulties, and it reaches the substantial justice of the case, because it meets the only argument of considerable weight that struck my mind, namely, the possibility that the bankrupt might have been the creditor, and the injustice which would have been done to his estate, if these effects could on account of the bankruptcy have been withdrawn from the mass of his estate. Now as the principle upon which my opinion proceeds is, that the bankrupt would have had a lien upon those effects for every thing for which his estate was creditor, that difficulty is removed. Upon this ground I concur in thinking that the judgment in this case ought to be affirmed, and it is the unanimous opinion of the court, that the judgment be affirmed."

So, in the case of *Parke v. Eliafon* and others, assignees of *Perfent* and *Bodecker*, Bankrupts (q), which was an action of *assumpsit* for money had and received by the defendants to the plaintiff's use. Upon the trial a verdict was found for the plaintiff for 471*l.* 10*s.* 6*d.* subject to the opinion of the court on the following case: on the 17th of *August* 1799, M. *Cullen*, as agent for the plaintiff, wrote a letter to the bankrupts, who were then merchants in *London*, inclosing several bills of exchange, indorsed in blank by the plaintiff, amounting to 4837*l.* 10*s.* 11*d.* as follows: "A friend of mine wishes to place the within inclosed bills, amounting to 4837*l.* 10*s.* 11*d.* in your hands, to be allowed permission to draw without renewals at two or three months,

(p) The Chief Justice is supposed, by the Reporter, to refer to the argument of Mr. Justice *Grose*, in 5 Term Rep. 233.

(q) 1 *East Rep.* 544.

allowing the commission formerly mentioned in your letter. I shall be obliged by your making a calculation of the sum to be drawn for. Your compliance will much oblige, &c."

13th July 1799.	Sterling and Hunter's note at	£.	s.	d.
	six months - - -	1423	7	4
	Pardo on Da Costa, nine ditto	733	11	0
	G. Frazer and Co. on Hymen,			
	Cohen and Co. fourteen			
	ditto - - -	474	0	0
2d March 1799.	Parke on Auguilar and Co.			
	fourteen ditto -	1527	13	0
31st October 1797.	Begle and Jopp's on Jopp,			
	twenty seven ditto -	378	19	7½
31st October 1797.	Ditto on ditto twenty-seven			
	ditto - - -	300	0	0
		<hr/>		
		£ 4837 10 11½		
		<hr/>		

On the 19th of August 1799, the bankrupts returned the following answer to Mr. Cullen: "We have been duly favoured with your letter of the 17th, covering your remittances for 4837l. 10s. 11½d., which agreeable to your wishes we have discounted; and beg leave to hand you annexed an account thereof, by which you will observe there remains 471ol. 6s. 6d. for you to value upon us at three months' date without renewal, which drafts will on presentation meet due honor." On the 26th of August, Cullen wrote to the bankrupts as follows: I duly received your esteemed letter of the nineteenth current, and return you my best thanks for its contents. Mr. John Parke will draw for the bills you discounted, which please to honour." On the 28th of August the bankrupts wrote to Cullen as follows: "Your esteemed of the 26th instant apprises us, that Mr. John Parke has your authority to draw for the bills which we discounted, which draft will meet due honor." On the 21st of August the plaintiff drew bills at three months date upon the bankrupts amounting to 471ol. 6s. 6d., being the amount of the bills sent to them as aforesaid, allowing to the plaintiff interest for the three months, and deducting the commission agreed upon: which bills were accepted by the bankrupts, but on account of their insolvency they were unable to pay any of

of their acceptances. In *September 1799* *Perfent* and *Bodecker* became bankrupts, having in their hands the several bills received from the plaintiff unnegotiated; and for which the defendants as their assignees in and previous to *May 1800*, received the full amount. Three of the acceptances amounting to 1600*l.* given by the bankrupts to the plaintiff were negotiated by him, but in consequence of their bankruptcy the bills were returned to him dishonoured; and he tendered the same, and also the other six bills, amounting to 3210*l.* 6*s.* 6*d.*, which had not been negotiated, to the defendants on the 18th *September 1800*, previous to the commencement of this action, and demanded payment of the money which they had received upon the bills discounted by the bankrupts as before stated.

The Court determined that the bills had been placed in the hands of the bankrupts for a *particular* purpose, and therefore gave judgment for the plaintiff.

Lord *Kenyon*, Ch. J. said, "Some confusion has arisen by supposing that there is a technical sense annexed to the term discount, which cannot be gotten rid of; but that is explained by considering the true nature of the transaction. If the bills had been taken to the bankrupts upon a simple proposal to discount them, the transaction would have been merely that of a purchase, and no question could have arisen. But this is nothing like a case of discount; but the bills were placed in their hands to answer a particular purpose. The first proposal to them is to know to what extent the plaintiff might draw on them upon a deposit of the bills. The bankrupts by their answer accept the offer, and specify the amount to which they will honor the plaintiff's drafts, at three month's date. If this had been a new case, there might have been as much difficulty in it as there was in the case of *Tooke v. Hollingworth*, which was very fully considered. There was indeed a difference of opinion among the judges of this court, but a majority thought with the plaintiff, and their judgment was afterwards confirmed in the Exchequer chamber upon a writ of error. The same principle was afterwards recognized in the case of *Bent v. Puller* (r), though the conclusion was different upon the facts, there disclosed; and it appeared to me that Mr. Justice *Bulder*, who differed from the rest of the court in the first case, re-

lented a little in the subsequent one; at any rate however the point is now settled, and the distinction clearly ascertained between the case of bills paid into a banker's hands on a running account, and the case of a single transaction like the present, where the deposit is made for a special purpose. Here the bills were deposited for the express purpose of enabling the plaintiff to draw on the parties to a certain amount; and those very bills having an ear-mark on them which distinguished them from the mass of the bankrupt's property, remained in specie in their possession at the time of the bankruptcy: then shall the assignees be permitted to appropriate them to the use of the bankrupt's estate when the other acceptances, in consideration of which the deposit was made, have not been paid? The assignees can only take the property of the bankrupts subject to every equity to which it was liable in their hands; and they having received these bills upon a condition which has failed, it is *secundum equum et bonum* that the plaintiff should recover back the value of them. I refer to the principles established in *Tooke v. Hollingworth*, and *Bent v. Puller*, which are plain and intelligible to all men, and I must lean against making any exceptions to them upon nice distinctions, which would serve only to perplex commercial transactions."

But, where A. and B. have a general running account consisting of bills drawn by B. on C. in favour of A., and of bills and other securities deposited by A. with B., and upon the failure of B. and C., A. be obliged to take up the bills received by him from B. whereby the balance of the accounts is in favour of A., still he cannot maintain trover for the bills deposited by him with B., unless they were specifically appropriated to answer B.'s drafts on C. in favour of A., and deposited for that purpose expressly.

Thus in the case of *Bent* and another *v. Puller* and others, assignees of *Caldwell and Co.*(*s*), which was an action of trover for two bills of exchange, one for 1000*l.*, the other for 495*l.* 13*s.* brought under an order of the court of Chancery, on hearing the petition of the plaintiffs, in the bankruptcy of *Forbes and Gregory*, merchants in London, and in the bankruptcy of *Caldwell, Smith, Forbes, and Gregory*, bankers at Liverpool. On the trial before Lord Kenyon at Guildhall, the case appeared to be thus. The

(*s*) 5 Term Rep. 494. See also *Bolton v. Puller and others*, 1 Bos. and Pul. 539. S. P.

plaintiffs kept a banking account, with *Caldwell* and Co., which consisted solely of bills received from them by the plaintiffs, drawn on the bankrupts in *London*, (who acted as bankers for *Caldwell* and Co., at *Liverpool*) on one side, and of bills and negotiable securities paid in by the plaintiffs on the other side. This account did not include any other dealings between them, though there existed other accounts between *R. Bent*, one of the plaintiffs, and *Caldwell* and Co. An interest account was regularly kept between the parties: when the bankers were in advance in cash, they debited the plaintiffs account with interest during such advance; when they had cash in hand, they gave credit for interest upon it. The account was balanced every three months; and the banker charged 5*s.* *per cent.* commission on the amount of the bills drawn by them, which constituted their profit. On the 28th *February* 1793, the account was balanced, in which was included all the bills received by the plaintiffs from *Caldwell* and Co. to that time; and supposing them all good, the plaintiffs would then have been debtors in 388*l.* 8*s.* 8*d.* On the 1st, 8th, and 15th of *March* the plaintiffs received from *Caldwell* and Co. other bills amounting together to 445*l.* 6*s.* 3*d.* On the 13th of *March*, the plaintiffs sent to *Caldwell* and Co. seven excise debentures, to the amount of 674*l.* 5*s.* 11*d.* which were received by the latter. On the 16th of *March*, *Forbes* and Co. stopped payment in *London*, at which time the plaintiffs had in circulation bills drawn on *Forbes* and Co. by *Caldwell* and Co. to the amount of 3326*l.* 7*s.* 4*d.* *Caldwell* and Co. stopped payment on the 18th of *March*. On the 16th of *March* about five in the afternoon the Plaintiffs sent to *Caldwell* and Co. fifteen bills (of which the two in question were part, the action being brought on two only to try the right) amounting to 3953*l.* 5*s.* 4*d.* which if placed to their credit, would turn the balance in their favour 799*l.* 16*s.* 4*d.* allowing all the bills received from *Caldwell* and Co. to be good; but those bills were afterwards returned to, and taken up by the plaintiffs on the failure of the drawers and acceptors.

The question was, whether the bills in question were paid by the plaintiffs to the house of *Caldwell* and Co. on a particular or general account. The plaintiffs contended that they were deposited with *Caldwell* and Co. for a particular purpose, namely to answer the bills given by *Caldwell* and Co. to the plaintiffs, and which were then running; and, that as the purpose for which they had been deposited had failed, the plaintiffs had a right to have them restored. That these bills could only have been re-
tained

tained by *Caldwell* and Co. for the purpose of indemnifying them against the payment of their own paper then in circulation; that, as that paper had been returned to, and taken up by the plaintiffs, the lien of *Caldwell* and Co. on the bills in question (which existed only for a particular purpose) was destroyed, and that the defendants, who represented *Caldwell* and Co. could not set up any defence that *Caldwell* and Co. could not.

On the other hand it was insisted, on the part of the defendants, that the bills in question were paid into the house of *Caldwell* and Co. on the general account that subsisted between them and the plaintiffs, and were not deposited with *Caldwell* and Co. to answer the specific bills drawn by them on *Forbes* and Co. in favour of the Plaintiffs; for that so far from there being any proof that the latter was the agreement of the parties, the contrary was evident from their general course of dealing; and, that as the bills in question had not only been paid into the house of *Caldwell* and Co. on that general account, but had been since actually negotiated by them to *Forbes* and Co. to whom they were then indebted, the plaintiffs had no right to recover them back. The jury after inspecting the plaintiff's books, thought that the bills were paid to *Caldwell* and Co. on the general account between them and the plaintiffs; the plaintiffs were therefore nonsuited.

The Court of *King's Bench*, upon a motion for a new trial, were also clearly of opinion, under the circumstances of the case, that the plaintiffs were not entitled to recover; and they accordingly refused the rule.

Buller, J. said: "That in order to make it a specific appropriation of bills there must be a lodging of a bill for a bill, or at least several deposited at once as one entire transaction to answer some particular purpose, whereas here the bills were paid in on a general running account, and the amount of the bills claimed as a deposit not even corresponding with the account of those for which they were supposed to be deposited. And that this case must be considered in the same manner as if the question had arisen before the bankruptcy of *Caldwell* and Co. in which case the plaintiffs could not have compelled the bankers to deliver up the bills in question on paying the others."

Lord *Kenyon* Ch. J. "I agree with my brother *Buller* that there must be either a bill pledged against a bill, or a transaction against
a trans-

a transaction: but here the bills were coming in day after day, not for the purpose of opposing a bill on one side of the account to another on the other, but all were paid on one general account. The plaintiffs therefore are not entitled to recover these bills on the ground that the particular purpose for which they were deposited has not been answered, because it does not appear that they were deposited to answer that particular purpose. On the trial, the jury, on inspecting the books, thought that this was a general banker's account, and that there was no specific appropriation of the bills in question; and it appears to me in the same light."

When a bankrupt fraudulently procures a bill of exchange from another, and his assignees receive the money for the bill, it may be recovered from them in an action for money had and received.

Thus, in the case of *Harrison v. Walker*, and another, assignees, &c. (1) which was an action of *assumpsit* for money had and received, brought to recover back a sum of 190*l.* 10*s.* which had been received by the defendants in payment of bills remitted by the plaintiff to the bankrupts under the following circumstances.

The bankrupts, previous to their bankruptcy, had sent a bill of 193*l.* 17*s.* drawn by themselves on one *Dawson*, and purporting to be accepted by him, to the plaintiff to be discounted. The plaintiff on the 10th of *November*, sent bills in return to the value of 190*l.* 10*s.* which arrived in town on the 12th, on which day one of the bankrupts absconded, the other having gone off on the 10th. It was afterwards discovered that the acceptance was a forgery, which the bankrupts knew of, and it was proved, that the defendants had received the money for the bills sent by the plaintiff.

Lord *Kenyon*, Ch. J. before whom the cause was tried, said: "The assignment under the commission passes only such property as the bankrupt is conscientiously entitled to. In this case the plaintiff had received no consideration whatever for the bills by him remitted to the bankrupt; and he is entitled to have the value of them, which the defendant received, returned to him." The plaintiff accordingly obtained a verdict.

So, where there are mutual accounts between a bankrupt and

(1) *Peake's Cas. N. P.* 111.

another person, and the latter (by mistake) pays the whole of the debt due from him to the bankrupt, without deducting the money owing to him from the bankrupt, he may recover it back from the assignees, by action of *assumpsit* for money had and received.

Thus in the case of *Bize v. Dickson* and another, assignees of *Bartenflag* (u), which was an action for money had and received by the defendants as assignees of the bankrupt to the use of the plaintiff. And on the trial a verdict was found for the plaintiff, damages 661*l.* 9*s.* 10*d.* subject to the opinion of the court of *King's Bench*, on the following case, viz. That the bankrupt being an underwriter, subscribed policies filled up with the plaintiff's name for his foreign correspondents who were unknown to the bankrupt; that losses happened on such policies to the amount of 655*l.* 9*s.* 7*d.* before the bankruptcy of *Bartenflag*, and were adjusted by him; that a loss on another policy to the amount of 6*l.* 0*s.* 3*d.* happened before the bankruptcy, but was not adjusted till after that event; that the plaintiff paid the amount of the losses to his foreign correspondents after such bankruptcy; that the plaintiff had a commission *del credere* from his correspondents; was made debtor by the bankrupt for the premiums, and always retained the policies in his hands; that a dividend of 10*s.* in the pound was declared under the said commission on the 15th of June 1782; that at the time of the bankruptcy there was due from the plaintiff to the bankrupt, the sum of 1356*l.* 0*s.* 3*d.* And there was due from the bankrupt for the above losses 661*l.* 9*s.* 10*d.*; that on the 15th of *March* 1782, the plaintiff paid to the defendants the sum of 750*l.*, and on the 17th of *November* 1785, the further sum of 606*l.* 0*s.* 3*d.* amounting to 1356*l.* 0*s.* 3*d.* and on the 18th of *November* 1785, the plaintiff proved the said sum of 661*l.* 9*s.* 10*d.* under the commission; that the plaintiff never received any dividend under the commission for or on account of the said losses; that a final dividend of the effects of the said bankrupt was declared by the said commissioners on the 24th day of *January*, 1786; that on the 1st of *February*, 1786, previous to such dividend being paid, the plaintiff caused a notice to be served on the defendants, purporting that he had paid them the said sum of 1356*l.* 0*s.* 3*d.* under a mistaken idea, without deducting therefrom the said 661*l.* 9*s.* 10*d.* for the aforesaid losses, on the said several policies subscribed by the bank-

(u) 1 *Term Rep.* 285. See also *Grove v. Dubois*. *Id.* 1:2, *S. P.*

rupt, for whom he was *deb credere* to the said foreign correspondents, and had paid such losses accordingly; and cautioning them against making any dividend until he was paid the said sum of 661*l.* 9*s.* 10*d.*

The court decided that the assignees ought to have refunded the money in question, and gave judgment for the plaintiff accordingly.

Lord Mansfield Ch. J. said, "The rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So, where a man has paid a debt, which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action."

11. *Of the Assignees liability to an Action of Assumpsit for a Dividend; and for an Allowance to a Witness.*

An action of *assumpsit* may be supported for a creditor's share under an order ~~for~~ commissioners of bankrupt for a dividend: and in such action, the proceedings before the commissioners are conclusive evidence of the debt; for after a debt is liquidated before the commissioners, it cannot be litigated but by an application to the great seal.

Thus, in the case of *Brown* and another, executors of *Gravatt v. Bullen*, assignee of *Fox* a bankrupt (*), which was an action of *assumpsit* for money had and received. The case appeared to be as follows: the testator, *Gravatt*, proved a debt of 410*l.* 1*s.* 7*d.* under the commission against *Fox*. Afterwards a dividend of six shillings in the pound being declared by the commissioners, and *Gravatt* having died in the interval, the plaintiffs, as his executors, demanded their share of the dividend, amounting to 123*l.* 0*s.* 1*d.*

(*) *Doug.* 467.

which

which the defendant refused to pay, alledging, that there was a balance due by *Gravatt* to the bankrupt. Upon which the plaintiffs brought this action. The defendant pleaded *non assumpsit*, and delivered a notice of set off.

At the trial it was contended, on the part of the defendant; 1. That the action could not be maintained, the only method of recovering debts proved under a commission of bankruptcy, being by application to the great seal. 2. That if the action was maintainable, the consideration and circumstances of the debt must be gone into and proved, as in other actions of *assumpsit*. 3. That, if this was not incumbent on the plaintiffs, yet it was competent to the defendant to avail himself of the notice of set off.

Lord *Mansfield*, Ch. J. overruled all these points. He thought, first, that the action was maintainable; 2. That the only way to question the proof of the debt taken by the commissioners, was by petition to the chancellor; that by the statutes, the oath of the party is to be the proof of the debt, and a particular penalty is imposed for swearing to a false debt; and, 3. That as the commissioners have a power of setting off mutual debts, the sum proved must be taken to be the balance due; but if it should happen, that only one side of the account appeared before the commissioners, or that any article was omitted on either side, on application to the great seal, the account would be again opened, and referred to the commissioners, or, in cases of difficulty, to the master." The jury under his lordship's direction found a verdict for the plaintiffs, and on a motion to set aside this verdict the court of *King's Bench* were of opinion that the direction of the Chief Justice was right.

Lord *Mansfield*, Ch. J. in delivering the opinion of the court upon this motion, said: "I allowed the plaintiffs to recover their share of the dividend against the assignees as money positively and expressly paid into the hands of the assignees for their use. We are all of opinion, that, the direction was right, that the action was maintainable, and that, after a debt is liquidated before the commissioners it cannot be litigated, but by an application to the great seal."

With respect to witnesses, it has been decided that the commissioners of bankrupt may make a verbal order upon the assignees of

of a bankrupt for the payment of the expences of a witness whom they have summoned to attend them, and that the same may be recovered against the assignees in an action of *assumpsit*.

Thus, in the case *Yarker v. Botham* and others (z). The declaration in this case stated, that a commission of bankrupt having issued against *Thomas Cooper* and *John Brown* of *Lancaster*, under which the defendants had been chosen assignees; that a summons signed by the major part of the commissioners named in the commission was served upon the plaintiff requiring him to attend the said commissioners. That the plaintiff did attend in pursuance of such summons, and was then and there examined: that the plaintiff was put to great expence in coming from *Lancaster* for the purpose of so attending the commissioners, and that they had ordered a certain sum of money to be paid to him for such expences, for which sum the action was brought.

By stat. 1 Jac. 1. c. 15. s. 10. power is given to the commissioners to summons persons having, or suspected to have or detain any part of the property of the bankrupt, and to examine them respecting it. And by the eleventh section of the same statute, "such witnesses so sent for shall have such costs and charges as the commissioners in their discretion shall think fit to allow."

The witnesses for the plaintiff proved the attendance of the plaintiff, and that having made a demand of his expences before the commissioners, they settled the sum to be allowed for the purpose: that *Botham* the defendant was present, and took an account of the plaintiff's demand, and promised to pay it.

This was the only evidence offered to support the action.

The counsel for the defendant insisted that it was not sufficient to sustain the action: that the claim was under a proceeding before commissioners of bankrupt: that their proceedings were in writing, and that therefore an entry in writing in the proceedings to the effect set up by the plaintiff should be shown in order to intitle him to recover, whereas this was only by parol. They further contended, that the plaintiff being himself a creditor, was bound to attend the commissioners on their summons, and therefore could not claim an allowance for what he was bound by law to do.

But Lord *Kenyon*, Ch. J. before whom the cause was tried over-

(z) 1 *Esq. Rep.* 64.

ruled both objections. He said, "that the act of parliament having given the commissioners a power to allow any person his expenses whom they had called upon to attend them, that the order in the present case, was made in pursuance of that authority, and that it was not necessary that it should be in writing." The plaintiff obtained a verdict accordingly.

12. Of Monies received by Assignees who have been Removed.

If an assignee of a bankrupt be removed, and assign his interest to the other assignees, they may maintain an action of *indebitatus assumpsit* against him, to recover any money which he may have received as such assignee.

Thus in the case of *Smith* and others, assignees of *Lewis and Potter, v. Jameson* and another (a), which was an action of *assumpsit* for money had and received. *Robert Jameson* one of the defendants was a joint assignee with the plaintiffs, but was afterwards removed by order of the Lord Chancellor; and then re-assigned all his interest to the plaintiffs.

Whilst he was an assignee, he had received several sums of money which he had applied to the use of himself and the other defendant, (with whom he was in partnership,) with the approbation of the other defendant, who knew that the money was part of the bankrupt's estate.

The present action was brought under the direction of the Lord Chancellor, to determine whether the estates of both defendants were liable, (they having become bankrupts,) and they were to be examined as witnesses, if necessary.

The counsel for the defendant objected to the action in point of form. He said that one defendant having been assignee of the bankrupt's estate, was himself entitled to receive this money, that he could not have maintained an action against himself, and having assigned only such an interest as he himself had, could not in point of form be a defendant.

But Lord *Kenyon*, Ch. J. said, "When an assignee assigns his interest, he divests himself of all right, and becomes a debtor to

(a) *Peake Cas. N. P.* 213.

those who remain assignees. *Chofes* in action have always been considered as assignable in case of bankruptcy." A verdict was therefore found for the plaintiffs.

13. *Of Promises, &c. to pay Money in Consideration that the Assignees will forbear to examine a Bankrupt, or will stay Proceedings under the Commission, &c.*

A promise made by a friend of the bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as being against the policy of the bankrupt laws.

Thus, in the case of *Nerot v. Wallace* and others, assignees of *Reily* and *Collins*, bankrupts, in error (b). It was an action upon the case in *assumpsit* brought in the Court of *Common Pleas*; and the declaration, after stating the trading by the bankrupts, the petitioning creditor's debt, the commission of bankrupt, the appointment of the plaintiffs as assignees; that the three meetings were appointed, at the first of which *Reily* submitted to be examined; but *Collins* not being prepared, prayed time, which was given him; that at the adjourned meeting, *Collins* was charged by the plaintiffs with having received divers sums of money on the partnership account, which he had not accounted for, when the commissioners required him to render a true account of the sums which he had received on the partnership account, and in what manner he had disposed of the same, and were then about to examine him in due form of law, and to compel him to make a full disclosure touching the same, proceeded to state, that in consideration, that the plaintiffs, at the special instance and request of the defendant, would forbear to proceed to have the examination of the said *Collins* taken by and before the commissioners, concerning the said sums, which had been received by the said *Collins* on the partnership account, and which had not been duly accounted for by him to the partnership, and in what manner he had disposed of the same; and that the commissioners would accordingly forbear and

desist from taking such examination; he, (the defendant,) undertook and faithfully promised the plaintiffs, as assignees, to pay to them all such sums of money which *Collins* had received on the partnership account, and which had not been accounted for by him to the partnership. The plaintiffs then averred, that they, confiding in such promise, did forbear, and have always forborne to have such examination, &c. taken before the commissioners, &c. and that the said commissioners did forbear and desist from taking such examination, &c. The declaration then stated that *Collins* had, at the time of the making such promise, received divers sums of money, amounting in the whole to a large sum of money, to wit, 1000*l.* on the partnership account, and which had not been by him duly accounted for, which the plaintiffs demanded of the defendant, who refused to pay, &c. There were other counts for money paid, laid out, and expended, money had and received; and on an account stated.

The defendant pleaded the general issue. At the trial a verdict was given for the plaintiffs for 852*l.* A motion was afterwards made in the Court of *Common Pleas* to arrest the judgment, which was refused. The defendant then brought a writ of error in the Court of *King's Bench*.

The Court determined that the consideration of the promise in the first count was void, as being against the policy of the bankrupt laws.

Lord *Kenyon* Ch. J. said: "The question is, whether the verdict can be sustained on the promise laid in the declaration? And I am clearly of opinion that it cannot. I do not say that this is *nudum pactum*: but the ground on which I found my judgment is this: that every person, who in consideration of some advantage, either to himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact, but in law. Now the promise made by the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform; because the commissioners had nevertheless a right to examine the bankrupt, and no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees did not stipulate only for their own acts, but that also the commissioners should forbear to examine the bankrupt: but clearly they had no right to tie up the

the hands of the commissioners by any such agreement. And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it. But it has been argued, that after verdict something may be intended to support it: but I do not see what we could presume in this case to support the verdict. It is impossible to say, that the bankrupt had only received a certain sum, for then we must suppose, that the plaintiffs had proved a negative. If they had not precluded themselves from any further examination, circumstances might have led to suspect that further sums might have been discovered on a future examination. Then it has been said, that the creditors would not suffer any inconvenience from this agreement not to examine the bankrupt, because by another mode of examination, by a bill in equity, they might have obtained a full disclosure. But my experience in that court does not suggest the possibility of filing such a bill in equity: and if there could be such a bill, it cannot be contended that an answer to a bill in chancery is as likely a mode of obtaining a discovery as a *visu voce* examination before the commissioners. But the principal objection to the consideration of this promise is, that it is contrary to the policy of the bankrupt laws. These laws, which have been revised and corrected as much as human wisdom will permit, have pointed out certain modes of examination, which the legislature has entrusted to certain persons acting for the benefit of the creditors; all which might be put an end to by an agreement of this sort, and without the consent of the commissioners or the creditors at large. Therefore I am clearly of opinion, that the consideration which was held out to the defendant below, was such as the plaintiffs had no power to offer. If the creditors indeed had been called together, and they had consented to the agreement, that might perhaps have altered the case: but they must have been convened by an advertisement in the public papers for that particular purpose; for it was repeatedly determined by Lord-Hardwicke, that a general power given to the assignees to compound debts was not sufficient, but the creditors must be called together to consider of each particular case.

But, an agreement by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission is good in law.

Thus, in the case of *Kaye v. Robert Bolton* (c), which was an

(c) 6 Term Rep. 134.

action of *covenant*. The declaration set forth certain articles of agreement, dated the 6th of *April* 1793, between *Isaac Bolton* of the first part, the plaintiff of the second part, *W. Hardham, E. Threlfal*, and *J. H. Hobrow*, the major part of the commissioners, named in a commission of bankrupt issued against *I. Bolton*, of the third part, the defendant of the fourth part, "and the several creditors of the said *I. Bolton* whose names were thereunto subscribed and seals affixed, being *J. F.*," &c. (naming them, in number 24,) of the fifth part; in which it was recited that a commission of bankrupt had been awarded against *I. Bolton*, under which he had been declared a bankrupt, and that the plaintiff had been elected sole assignee of his estate, but that the defendant, in order to put an end to any further proceedings under the commission had, with the consent and approbation of the bankrupt, the plaintiff, "and the several creditors, whose hands and seals were thereunto subscribed and affixed," and also of the commissioners, agreed to pay and discharge all sums of money due from the bankrupt, &c. such demand to be first verified before a *Master in Chancery*, on oath, if required by the defendant, or to give security for the payment thereof to the satisfaction of the plaintiff "and the rest of the creditors" within one month from the date thereof. By the deed it was agreed that the said commissioners should settle and ascertain on oath as commissioners, the plaintiff's bill of costs as solicitor under the commission, and also for his trouble as assignee within the time aforesaid; and that the amount thereof, together with the whole of his debt and demand proved under the said commission, as well as his mortgage on the *Hope* and *Anchar* should be secured to be paid to the satisfaction of the plaintiff within one month, the defendant also agreed to indemnify and save harmless the plaintiff, his heirs, &c. from all costs, damages, &c. respecting the staying of the prosecution of the said commission, &c. Both the plaintiff and the defendant agreed to indemnify the commissioners; and "the several persons, whose names were thereunto subscribed and seals affixed," being the creditors of the said *I. Bolton*, to wit, *J. F.* &c. (naming them again) agreed to accept the security of the defendant, and not to commence any suit against the plaintiff or the defendant on account of any debts from the bankrupt or the plaintiff as his assignee, or touching the said commission, &c. Then followed a covenant by the defendant to fulfil the agreement on his part: and a covenant by the plaintiff, to convey the bankrupt's estates to the defendant, or to such person as he should appoint,

point, and to account for all monies received by him, and to join in any application for a *superfedeas* as soon as the agreement should be carried into execution by the defendant: in which latter "the creditors, to wit, *J. F.*" (naming them again) agreed to join. It was then averred in the declaration, that at the time of making the above agreement, the sum of 155*l.* 13*s.* 3*d.* was due from the bankrupt to the plaintiff, that that debt had been proved under the commission, and that the plaintiff was at all times ready to verify it on oath, if required; that after the making of the agreement, the three commissioners settled and ascertained on oath as commissioners the plaintiff's bill of costs under the commission, and ascertained that the sum of 91*l.* 3*s.* 9*d.* was due to the plaintiff for his bill of costs; and that the further sum of 164*l.* 5*s.* 1*d.* was due to the plaintiff, on mortgage on the *Hope* and *Anchor*; which sums amounted together to 411*l.* 2*s.* 1*d.* Two breaches were then assigned; one, that the defendant had not given security to the satisfaction of the plaintiff, for the payment of the said sums of money, amounting to 411*l.* 2*s.* 7*d.*; the other that he had not saved the plaintiff harmless from all costs, damages, &c. respecting the staying of the prosecution of the said commission, &c. for that the plaintiff had lost and expended 40*l.* in and about the staying of the prosecution of the said commission, &c.

To this declaration there was a general demurrer.

But the Court decided that the agreement was not illegal, it having been made with the consent of all the creditors. That it appeared by the different parts of the deed that all the creditors were parties to it; the words, the "creditors," which mean all, occurring in different places, and the words, "to the satisfaction of the plaintiff and the rest of the creditors," occurring in another instance. And that the last objection was not warranted in fact; because the averment was not that the commissioners had ascertained what was due on the mortgage as well as for the bill of costs; but the latter sentence was distinct from the preceding one, and was only an averment by the plaintiff, that in fact so much was due to him on the mortgage. On the general question, Lord *Kensington*, Ch. J. said: "This seems to be a fair agreement, and not contrary to the policy of the bankrupt laws. The object of those laws is to have an equal distribution of the bankrupt's effects among his creditors; that will not be defeated by a friend of the bankrupt undertaking with the consent of all the parties concerned, (not to divide among the creditors a fund which was probably in-

sufficient for that purpose, but) to pay to every creditor his full debt. And if the creditors are to receive the whole amount of their demands, it would be monstrous to say that the bankrupt's estate shall still be torn in pieces by the expence of the commission."

Lawrence, J. "This case is very distinguishable from that of *Nerot v. Wallace*. It was there intended that the bankrupt should receive his certificate without making a disclosure of his effects, and the consideration of the promise was the suppressing of the bankrupt's examination, which was to be gone into for the purpose of ascertaining, among other things, whether or not he was entitled to his certificate." Judgment was accordingly given for the plaintiff.

CHAPTER XI.

Of Executors and Administrators.

THE subject of the present chapter will be considered in the following order :

1. *Of an Executor's and Administrator's Right to the Debts and Contracts of the Testator or Intestate ; and of Actions by them in respect thereof.*
2. *Of an Executor's or Administrator's Liability to be sued upon Contracts made by the Testator or Intestate.*
3. *Of an Executor's Liability for Funeral Expences.*
4. *Of a Promise by an Executor to pay the Debt, &c. of his Testator.*
5. *Of a Debtor making his Creditor Executor ; et vice versa.*
6. *Of an Executor de son tort.*
7. *Of an Executor's Liability to be sued for a Legacy.*

1. *Of an Executor's and Administrator's Right to the Debts and Contracts of the Testator or Intestate: and of Actions by them in respect thereof.*

An executor, or administrator, represents the person of his testator or intestate as to all his *personal contracts*; and therefore may regularly maintain any action for the breach thereof which the testator or intestate himself might have done, if living (*a*).

So if money be payable to *B.* without naming his executor, yet his executor or administrator, shall have an action for it (*b*).

So, if money be payable to *A.* or his assignees, his executor shall take it; for he is assignee in law (*c*).

So, if a man having 1000*l.* of *B.*'s money, agrees that so long as he has the money in his hands he will pay 100*l.* annually to *B.*, his executor shall have an action for it, for it appears, that it was intended for the interest of the 1000*l.* which the executor shall have (*d*).

So, if money is awarded to *B.* and that he shall release; the executor of *B.* shall have the money, and make the release, though his testator died before the day of payment (*e*).

Where a person who has no right to administer to an intestate, obtains letters of administration to him, and sells his property, if his administration is repealed, and a fresh one granted to the person legally intitled to administer, the latter may recover from the former the money for which he sold the intestate's property in an *indebitatus assumpsit* for money had and received (*f*).

So, in the case of *Jacob v. Allen* (*g*), which was an action of *indebitatus assumpsit* for money had and received to the plaintiff's use. Upon the trial, the facts proved were as follow: *H.* having letters of administration, appointed the defendant by letter of attorney to receive money owing to the intestate, who accordingly received the same, and paid it to the administrator; afterwards a

(*a*) *Co. Lit* 209. *a. Bac. Ab. tit. Executors and Administrators*, N.

(*b*) *Com. Dig. tit. Administration*, B. 11. *Co. Lit* 209.

(*c*) *Hob.* 9.

(*d*) 1 *Roll. Ab.* 913. l. 15. *Sty.* 140. But such a contract would now be considered as usurious. See the *Stat.* 12 Ann.

c. 16 *Com. Dig. tit. Using A.*

(*e*) 2 *Ventr* 249. 1 *Leo.* 216.

(*f*) *Lam. ne v. Dorrel*, 2 *Ld. Ray.* 216.

(*g*) 1 *Salk* 27.

will appearing, the letters of administration were called in, and repealed by citation, and the executor brought an *indebitatus assumpsit* against the defendant for money had and received to the use of the plaintiff. To this action two objections were made, 1st, that the defendant acting only as attorney for him that was in fact administrator, it was the receipt of the administrator, and not of the defendant; 2dly, that it ought to be a *special assumpsit*, and not a *general indebitatus*; for the money being received by special authority, and that expressly to the use of another, this express intent suspends and hinders the operation of law, and the raising of an *implied contract* to a third person: *Sed non allocatur*; "for the administration was merely void, and consequently the administrator could give no authority, and so the attorney acted without authority; and then there is nothing to hinder the raising an *implied contract*, and charging the defendant by *indebitatus assumpsit* to the executor." Judgment was accordingly given for the plaintiff.

But in the case of *Pond v. Underwood* (b), which was also an *indebitatus assumpsit* brought by the plaintiff *Emanuel Pond* as executor of *Charles Pond*, deceased, for money received by the defendant owing to the testator for wages (he being a seaman) after the testator's death. On the trial it appeared in evidence, that before the will was found, administration, &c. was granted to *Anne Pond* a sister of *Charles Pond*, and that she made a warrant of attorney to the defendant to receive this money, being 21*l.* by virtue of which warrant he did receive it, and paid it to *Anne* before any notice given of this will. And by the direction of the Lord Chief Justice *Holt*, before whom the cause was tried, the plaintiff was nonsuited: for his Lordship said, "though all acts done by an administrator where there is a will, are void, and such an action in this case would lie against *Anne Pond*; yet it is hard to make the defendant liable, he having paid the money over to the administrator, before he knew of the will."

So, payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null and void,

(b) 2 Lord Ray. 1210. See also 4 Bur. 1986. where Lord Mansfield expressed his assent to this case, and his disapprobation to the preceding case of *Jacob v. Allen*.

and administration be granted to the intestate's next of kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts.

Thus, in the case of *Allen*, administrator of *Thomas Priestman*, otherwise *Handy*, v. *Dundas* (i), which was an action for money had and received to the use of the intestate as administrator. And on the trial, a special verdict was found, stating in substance as follows: The defendant as treasurer of the navy, was indebted to the intestate in his lifetime in 58*l.* 13*s.* 6*d.* for money had and received to his use. *Priestman* died on the 2d of *June* 1784: on the 13th of *August* 1785, one *Robert Brown* proved in the *Prerogative Court of the Archbishop of Canterbury*, a forged paper writing, dated the 18th of *May* 1784, purporting to be the last will of *Priestman* otherwise *Handy*; whereby he was supposed to have appointed *Brown* the sole executor thereof; and a probate of that supposed will issued in due form of law, under the seal of that court on the same day in favour of *Brown*. The defendant not knowing the will to have been forged, and believing *Brown* to be the rightful executor, on *Brown's* request paid him 58*l.* 13*s.* 6*d.* being the whole balance then due from the defendant to *Priestman*. On the 21st of *July* 1787, *Brown* was called by citation, at the suit of *John Priestman* the father, and next of kin of the deceased, in the *Prerogative court of the Archbishop of Canterbury*, touching the validity of such supposed will; and such proceedings were thereupon had in that court, that the will and probate were declared null and void; that *Thomas Priestman* died intestate; and that *John Priestman* the father was his next of kin. And on the 31st of *March* 1788, letters of administration of the goods, &c. of *Thomas Priestman* were granted by that court in due form of law to the plaintiff, as attorney of *John Priestman*.

The Court determined that the payment was protected by the probate; and accordingly gave judgment for the defendant.

Ashburst Justice said: "I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who had at that time a legal authority to receive it. It is admitted that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demand for it; but I think that makes no difference. For as the party to whom the payment was

(i) 3 Term Rep. 135.

made had such authority as could not be questioned at the time, and such as a court of law, would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it; this therefore cannot be called a voluntary payment. This is different from payments under forged bonds or bills of exchange; for there the party is to exercise his own judgment, and acts at his peril: a payment in such a case is a voluntary act, though perhaps the party is not guilty of any negligence in point of fact. But here the defendant acted under the authority of a court of law; every person is bound to pay deference to a judicial act of a court having competent jurisdiction. Here the spiritual court had jurisdiction over the subject matter; and every person was bound to give credit to the probate till it was vacated. The case of a probate of a supposed will during the life of the party may be distinguished from the present; because during his life the *Ecclesiastical Court* has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction. Besides, the distinction taken by the defendant's counsel between cases where a will is set aside on an appeal, or on a citation, seems to have some foundation: in the former, the original sentence is as if it had never existed; in the latter the will is only repealed, and all acts under it till the repeal are good. But the foundation of my opinion is, that every person is bound by the judicial acts of a court having competent authority; and during the existence of such judicial act, the law will protect every person obeying it."

Where there are several executors or administrators, they have a joint and entire interest in all contracts of the testator or intestate; and therefore they must all join in an action thereon; although some may have omitted to prove the will, or have even refused before the ordinary (k).

But where several are named, and one only proves the will and acts, it is said (l), that one may sue alone, *after* the others have renounced.

In an action by an executor, or administrator upon a contract made with the testator, or intestate, the plaintiff must be

(k) *Com. Dig. tit. Pleader 2 D. 1. Toller's Executor, 446, 2d Edit.*

(l) *Per Buller Just. 4 Term Rep. 565. See also Toller's Executor, 446. described*

described in his representative character of executor or administrator (m).

But for money due to the testator in his life time, but received after his death, the executor may declare either in his own right, or as executor. And in an action for the recovery thereof the defendant cannot set off a debt due to him from the testator.

Thus, in the case of *Milnes v. Shipman v. A. Thompson* (n), which came before the Court of *Common Pleas* on a case reserved at the trial before Mr. Baron *Fortescue* which stated " that the plaintiff's late husband by his will made the plaintiff and Dr. *Morgan* (since deceased) his executors. In his lifetime, he had appointed the defendant his steward by letter of attorney, who after the testator's death received of several tenants several sums of money due to the testator in his lifetime. The plaintiff brought this action in her own name, not naming herself executrix, for the money so received. The defendant gave a notice of set off, for several sums due from the testator to him, which the judge would not permit the defendant to set off.

The questions reserved were; 1st. whether the plaintiff should not have declared as executrix; 2dly, whether the defendant ought not to have been permitted to set off the money due to him from the testator.

The Court, after argument, gave judgment for the plaintiff on both points. And *Fortescue*, Baron, said, " The true distinction I think, is this, that where the thing sued for is assets in the hands of the executor or administrator before the recovery, or where the cause of action arises in the executor's own time, and never did arise to the testator, there the executor may bring the action either in his own name or as executor. And this is laid down as law in the case of *Jenkins and wife v. Plombe, Salk. 207.*, but better and more fully reported in *6 Mod. 92, 181.* That was an action brought by the husband and wife as executrix upon an *indebitatus assumpsit* for money had and received by the defendant to their use as executrix: it is true that the judgment of the court was only that upon being nonsuit the plaintiffs ought to pay costs: but the reason of the judgment was because they might have

(m) *Com. Dig. tit. Pleader. 2 D. 1.* (n) *Willes Rep. 103.* See also *Smith v. Barrow, 2 Term Rep. 477.* Per *Alshurst Jux. S. P.*

brought the action in their own name, and not as executrix; for wherever an executor may have the action in his own name he shall pay costs. And the case of *Eaves v. Mocato*, *Salk.* 314. was cited there, and this difference taken, that there were several counts by a plaintiff as executor, one whereof was an *infimul computasset*, and being nonsuited he paid no costs, because there was no new cause of action, but a new action ascertaining the ancient cause, which is still a debt of the testator's. And in the case of *Jenkins v. Plombe*, as appears from *Salkeld*, this distinction of *infimul computasset* is also taken; and it was said, that if the defendant received this money by the appointment of the plaintiff, it was assets immediately, if without his consent, yet the bringing of the action is such a consent that upon judgment it shall be assets immediately before execution, which otherwise it would not be until after execution; and the reason is because it is recovered against a person who never was indebted to the testator, and the original debt was discharged.

“ To apply this to the present case; here is money received by the defendant since the testator's death, and therefore it could not be received to the use of the testator, but must be received to the use of the executor. The executor has consented by bringing the action, and the money is assets immediately upon the judgment. It is quite a new debt created from the defendant to the executor since the death of the testator, and a new cause of action which was not subsisting before. The defendant was never indebted to the testator for this money, and the original debtors, the tenants are discharged. No doubt had the action been brought against the tenants, it must have been brought against them by the plaintiff as executrix, because it was a debt as to them subsisting in the testator's lifetime, and no new cause of action arising to the executrix.

“ As to the set off; we cannot consider the convenience or the inconvenience on one side or the other, but must go according to the act; for the statute 2 *Geo. 2. c. 22. s. 13.* says, if either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; so that it is confined by the statute expressly to cases where the suit is as executor or administrator. And therefore in the present case, the suit not being as executor, I think it is not within the statute, and that the debts due from the testator to the defendant cannot be set off against
this

this plaintiff in an action brought by her in her own name and not as executor. And supposing this to be so, it was urged as one reason why the action here ought to have been brought by the plaintiff as executrix: but this statute will not alter the law as to that point from what it was before; and if the statute has not remedied all the inconveniences, we must take it as it is, and cannot (I think) extend it farther. So the postea must be delivered to the plaintiff, and she must have her judgment."

2. Of an Executor's or Administrators' Liability to be sued on Contracts made by the Testator or Intestate.

2 In 8418. An executor or administrator is answerable for the contracts and agreements of his testator and intestate, as far as he has assets, though he be not expressly mentioned therein (o).

As if goods be sold and delivered to A. who dies, not having paid for them, and leaves B. his executor, the vendor may maintain an action of *assumpsit* against the executor for the amount of the goods so sold (p).

So, it hath been resolved, that there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages; for wherever the testator himself would have been liable to an action, his executor or administrator shall be liable also; except, indeed, upon such contracts or agreements which require something to be performed by the testator in person, because in such case the executor cannot perform it (q).

If therefore a man promises another, that in consideration that he will marry his daughter, to give him as much as he hath given or should give with any of his other daughters, if after he gives such a sum with another of his daughters and dies, an action upon this *assumpsit* lies against the administrator, notwithstanding it be collateral (r).

So, if A. buys goods of B., and because B. distrusts the payment of A., J. S. promises that if A. does not pay him at such a day, he himself will pay it; J. S. dies, and the money is not paid at

(o) *Bac. Ab. tit. Executors and Administrators, P. Comp. 375.*

(p) *Pl. Com. 182. 1 Sid. 114. 1 Keb. 385. Lev. 200, 201.*

(q) *Gro. Jac. 404. 417. 571. Jon. 16. Palm. 329. Gro. Jac. 662.*

1 *Rel. Rep. 266, 433. 3 Bulstr. 235. (r) 1 Rel. Abr. 14 pl. 3. the*

the day, the executors of J. S. may be charged in an action upon this promise, though it be collateral. (s)

So, in an action upon the case (t) against an executor, if the plaintiff declare, that whereas he had sued an action against B. the defendant's testator, whereupon B., in consideration that the plaintiff would forbear to prosecute the said writ further against him, promised to pay 50*l.* to the plaintiff; the action lies against the executor upon this promise, because such promise is not collateral, for that an action of *debt* would have lain against the testator upon this promise.

So, in case against an executor, (u) the declaration was of a promise by testator to deliver certain goods in his possession to the plaintiff upon request. It was objected that, the testator's promise was, that himself would deliver the goods, and not that his executor should, and that he would do it on request; but no request appears to have been made to the testator. But *per Roll.* Ch. J. an executor may be charged on a collateral promise, if there was a breach of it in the testator's lifetime, and the request here is good and goes to all.

3. *Of an Executor's Liability for Funeral Expences.*

An executor is not liable to pay for funeral expences, unless he personally contracts with the undertaker; because this is a charge which would make him liable *de bonis propriis*. (x)

4. *Of a Promise by an Executor to pay the Debt, &c. of his Testator.*

If an executor or administrator for a good consideration promise to pay the debt of his testator or intestate, he is liable *de bonis propriis*. (y)

Thus, (z) if A. (to whom the testator was indebted) comes to the executor, and says that he intends to sue him for the debt;

(s) 1 *Roll. abr.* 14. pl. 6.

(t) *Ibid.* pl. 7. *Hob.* 216.

(u) *Sty.* 158.

(x) *Holt.* 309.

(y) In what cases the promise of an executor to pay the debt of his testator must be in writing by virtue of the statute of frauds. Vide ante *Voh.* 1. Part I. ch. 4. f. 1.

(z) 1 *Roll. abr.* 24. pl. 33. 9 *Co.* 94. 1 *Dan. abr.* 53. But see 2 *Bulfr.* 278. 3 *Leon* 67. 1 *Vent.* 152.

upon which the executor promises in consideration that the plaintiff will forbear him for a reasonable time he will pay him, and *A.* forbears to sue him for a reasonable time; this is a good consideration to charge the defendant in an action upon the case, *out of his own estate* without assets; for by this promise it is intended as well to forbear to sue the executor, as to forbear the debt, and a forbearance of suit is a good consideration without assets at the time of the promise.

So, if a man makes a contract with *J. S.* and dies intestate, and his administrator, in consideration of forbearance, &c. promises to pay, &c. this is a good consideration, though the administrator was not chargeable upon this contract at common law, for he was chargeable in conscience. (a)

So, where a surety paid a sum of money for his principal, and after the death of the principal his executor promised the surety, that if he would forbear to sue for such a time, he would pay the money. It was moved in arrest of judgment, that this consideration was void: but *per Curiam*, the action well lies against the executor, because he was liable in equity. (b)

So, where a person being executor, in consideration the plaintiff would account with him, promised to pay the plaintiff what should be found owing to him from the testator: it is said, (c) that this was held a good consideration, though the executor had no assets because there was an act done, viz. accounting at the executor's request.

But in the case of *Secar v. Atkinson* administratrix of *Atkinson*, (d) which was an action of *assumpsit*; and the declaration consisted of four counts. The first for goods sold and delivered to the intestate; second, *quantum valebant*; third, money paid to the use of the intestate; fourth, *that the plaintiff accounted with the defendant as administratrix, as aforesaid, of and concerning divers sums of money, &c. owing from the intestate to the plaintiff*, and upon that account the intestate was found in arrear and indebted to the plaintiff, &c. and being so found in arrear and indebted she, the

(a) 1 *Rel abr.* 28 pl. 56. *Mo.* 702. *Pl.* 977. *Cro. Jac.* 47. *Yelo.* 55. But see *Cro. Eliz.* 804. For more concerning promises by executors in consideration of forbearance, vide *Post Vol. 2. Part III. chap. 14.*

(b) *Scott v. Stevens*, *Sid.* 89. *Lev.* 71.

(c) Vide *Hawes v. Smith* 2 *Lev.* 122. 1 *Ventr.* 268. *S. C.* See also *Freeman* 464. pl. 635. 3 *Keb.* 336, 417. *Ha.* 8. 11. *Cro. Car.* 70. See vide next case.

(d) 1 *H. Bl.* 102.

said defendant as administratrix as aforesaid, in consideration thereof promised, &c.

To this declaration it was objected that there was a misjoinder of action; for that the judgment on the three first counts, would be *de bonis testatoris*, and on the latter, *de bonis propriis*, because in the last count the defendant is charged in her own right. And in support of this objection was cited the case of *Howes v. Smith*. But the court overruled the objection; and *Heath, J.* delivered the opinion of the court as follows: "This is an action brought against an administratrix for a debt due from the intestate. And unquestionably, if the judgment were to be, as it has been contended, in one instance *de bonis testatoris*, and in the other, *de bonis propriis*, the declaration would be bad, but we are of opinion, that the objection is not founded in truth, and that the defendant is charged as administratrix on all the counts. The authority which was chiefly relied on, was an anonymous case, in *Ventris*, more correctly reported in 2 *Levinz*, by the name of *Hawes v. Smith*, which was a writ of error, on an action in this court against an executor, in which the plaintiff declared on an account stated at the request of the defendant: the judgment was for the plaintiff, *de bonis propriis*; and on error brought, this judgment was affirmed in the *King's Bench*, it being holden not to be error, because the plaintiff was not bound to account with the executor, and yet did account at the request of the executor; therefore a good consideration was raised. But it is very difficult to reconcile that case with any true principle of law. The plaintiff was bound in equity and conscience to account, the defendant might have had a writ of account against him, by the statute of 31 *Ed. 3.* as appears from Lord *Coke's* commentary on the statute of Westminster the second. It is also said in the case of *Hawes v. Smith*, that the promise was in consideration of forbearance to sue; but so far is it from being like forbearance to sue, that the defendant desires to account, and facilitates the bringing a suit, by ascertaining the sum due. It was also said that the plaintiff did not account at the request of the defendant, and so there was no consideration for the promise; but it is expressly stated that they accounted together, and that the defendant promised as administratrix. This is the common mode of declaring against executors and administrators, to save the statute of limitations; but if it were to be considered as making them personally liable, I do not know who would ever take out administration."

So, if an executor without any consideration, promises to pay the debt of his testator, when he has no assets, such promise is *nudum pactum, ex quo non oritur actio*.

Thus in the case of *Rann* and another, executors of *Mary Hughes v. Isabella Hughes* administratrix of *John Hughes* in error: (e) The declaration stated that on the 11th of June 1764 divers disputes had arisen between the plaintiff's testator, and the defendant's intestate which they referred to arbitration; that the arbitrator awarded that the defendant's intestate, should pay to the plaintiff's testator 830*l*. That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the said sum of 983*l*. was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable, she in consideration thereof undertook and promised to pay," &c. On this declaration a verdict was found for the plaintiff, and a general judgment was entered in the *King's Bench* against the defendant *be bonis propriis*. This judgment, however, was reversed in the *Exchequer Chamber*; and a writ of error was afterwards brought in the *House of Lords*; where after argument the following question was proposed to the Judges by the Lord Chancellor, "Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity;" upon which the Lord Chief Baron *Skynner*, delivered the opinion of the Judges to this effect.—It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the de-

(e) 7 Term Rep. 350. n. a. See also 3 Lev. 67.

defendant

ante p 10
4. 869
903

defendant in *her own capacity*. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be sufficient consideration to warrant an action against him or her in the latter right: but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration and obviates the objection of *nudum pactum* for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing: and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of *England*. His lordship concluded by saying, "that all his brothers concurred with him, that in this case there was not a sufficient consideration to support this demand as a *personal* demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative."

The House of Lords affirmed the judgment of the *Exchequer Chamber*.

So, if *B.* as administrator to *J. D.* is indebted to *A.* in 20*l.* and upon this *B.* in consideration that administration is granted to him and that he has assets in his hands, assumes and promises to pay the debt *tam cito* as any debt due to the intestate comes to his hands to the value of the debt, and after such a debt comes to his hands, yet no action lies upon this promise, for here is no consideration to maintain this action by which the administrator should be charged out of his own estate, for here the consideration is not to forbear to sue, or any other consideration. (f)

So, in the case of *Forth* and others v. *Stanton*, (g) which was an action of *assumpsit*, wherein the plaintiffs declared that one *Robert Stanton*, the late husband of the defendant, was indebted to *John Neve* and *Timothy Alfopp* in 100*l.* for beer sold by them to him, and being so indebted, the said *Robert Stanton* died; after whose death

(f) 1 *Roll. abr.* 24 pl. 32, and see 1 *Dan.* 52. (g) 1 *Saund.* 210.
M m 3 the

the defendant took into her hands, goods, and chattels of the said *Robert Stanton*, of the value of 100*l.* and administered those goods and chattels, as executor of the will of the said *Robert*, and that afterwards the defendant had paid 40*l.* parcel of the said 100*l.* to the said *Neve* and *Alsopp*. And whereas the said *Neve* and *Alsopp* afterwards had assigned to and appointed the plaintiffs to receive of the defendant 60*l.* residue of the said 100*l.* to the use of the plaintiffs, whereof the defendant had notice given to her: whereupon the defendant, in consideration that the plaintiffs, at the special instance and request of the defendant would accept the defendant to be their debtor for the said 60*l.* undertook and promised the plaintiffs to pay them the said 60*l.* And the plaintiffs aver that they had accepted the said defendant to be their debtor. And they also declared upon an *in simul computasset* for 60*l.* more.

It was objected that the declaration was insufficient, because there is no good consideration to found the promise; and it was argued that the defendant before the promise did not owe any thing to the plaintiffs, but to *Neve* and *Alsopp*: and by their assignment, they did not transfer any property or interest in the debt, being a *chose in action*, but only gave an authority to the plaintiffs to receive it, if the defendant would pay it. But if the defendant would not pay it, the plaintiffs could bring any action against her, but *Neve* and *Alsopp* must have sued for it. It is true, indeed, that if the defendant had paid the 60*l.* to the plaintiffs, she would be discharged against the said *Neve* and *Alsopp*; but in this case the defendant refused to pay; therefore *Neve* and *Alsopp* ought to bring the action against her, and not the plaintiffs, who have not any interest in the debt. And this case is no more, than if I promise a stranger, to whom I do not owe any thing, that if he will accept me to be his debtor for 60*l.* I will pay it to him, yet this is but a *nudum pactum*, because I was not indebted to him before. And my promise to pay, if the other will receive it is nothing but a mere voluntary promise, which does not bind me at all. And in the present case, if the promise should be good, the defendant would be charged *de bonis propriis*, where she was chargeable to *Neve* and *Alsopp* only *de bonis testatoris*; and yet here is no consideration at all so to charge her: and of this opinion was the whole court. And judgment was given for the defendant.

So, in the case of *Parker v. Baylis and wife*, (b) which was an

(b) 2 Bos. & Pul. 73.

action

action of *assumpsit*, wherein the plaintiff declared against *Wm. Baylis* and *Mary* his wife, the latter being administratrix of *Eliz. Stattard* deceased: for that whereas *Eliz. Stattard* died intestate possessed of South Sea stock which she held in trust for the plaintiff, and upon which certain dividends were due, in consideration that the plaintiff at his own expence would procure administration to be granted to *Mary Baylis* as the next of kin to *Eliz. Stattard*, and would furnish evidence to enable the defendants to receive the dividends, the said *William Baylis* and *Mary* his wife she being administratrix, as aforesaid, promised to pay over to the plaintiff the amount of the dividends when received.

The court held, that the consideration stated was insufficient to support the promise, and that the dividends never made part of the intestate's estate.

Lord *Eldon*, Ch. J. said, "The facts of this case are, that the plaintiff being entitled to a certain sum of 3 *per cent.* South Sea annuities standing in the name of *Elizabeth Stattard*, and also to the dividends which had accrued during her life, was desirous of obtaining possession of them through the medium of an administration. The consideration for the promise stated in the declaration is, that the plaintiff undertook to procure administration to *Mary Baylis* as next of kin, at his own expence, and also to procure evidence by which she should be enabled to receive the dividends. But this affords no consideration for the promise. Though *Mary Baylis* was next of kin, it does not appear that she was to derive any peculiar benefit from taking out administration, and if the plaintiff was desirous of placing some person between himself and the *South Sea Company* it is very obvious that he ought to pay all the expences attending that transaction. Whatever dividends had been received by the intestate in her life-time were part of the general funds; and with respect to them the plaintiff is entitled to demand payment out of the assets, either as a specialty or simple contract creditor, according as he may be possessed of security or not. But the present action seeks a judgment *de bonis intestati*, on the receipt of a sum of money by the defendants after the death of the intestate. The question is, whether *Mary Baylis*, who appears on this record rather in the character of trustee than in any other character, (for the stock is not assets,) has so much relation to the intestate that her personal act of receiving this money though as a trustee, shall give a general remedy to the *testuy que trust* against all the assets of the intestate in common

with the simple contract and specialty creditors? Not doubting that the plaintiff has abundance of remedies, I am of opinion that he is not entitled to charge the assets of the intestate with a demand founded on the receipt of that which never was a part of the intestate's estate."

Heath, J. also said, "It seems admitted, that judgment must be given *de bonis intestati* in this case in the first instance. But there has been no default on the part of the intestate. The receipt of dividends after the death of the intestate is the cause of action; and the promise of *Mary Baylis* is in consequence of that receipt. This promise will not bind her husband. And as the money never was assets for payment of debts, nonpayment in this case cannot bind the estate of the deceased."

So, a submission to arbitration by an administrator is not an admission of assets; and if a sum of money is awarded to be due from the intestate, without saying by whom it shall be paid, the administrator is not personally liable *de bonis propriis*, but only *de bonis testatoris*. (i)

So, a power of attorney given by an executrix to act for her as executrix, does not authorise the accepting of bills of exchange to charge her in her own right, for debts due from her testator.

Thus, in the case of *Gardner v. Baillie*, (k) which was an action of *assumpsit* on a bill of exchange, drawn by the plaintiff on the 4th of September 1793, for 793*l.* 7*s.* 9*d.* on the defendant, by the name and description of *Mrs. C. Baillie executrix of J. B., accepted by E. Thornton for, and on behalf of the defendant*, it being averred that *Thornton* was duly authorised to accept the same on the defendant's account. At the trial before Lord *Kenyon*, Ch. J. it was proved, on behalf of the plaintiff, that *Thornton*, who acted under a letter of attorney from the defendant accepted the bill in question, which was drawn and accepted for a debt due to the plaintiff from the defendant's testator, and evidence was offered to prove that the defendant had paid other bills drawn on her by other creditors of *J. Baillie*, and accepted on her account by *Thornton*, who on those occasions also acted under this power of attorney; but Lord *Kenyon* thought the evidence inadmissible. A verdict however was taken for the plaintiff, for the amount of the bill, with liberty for the

(i) *Bearson v. Henry*, 5 *Term Rep.* 6. See vide *Barry v. Rush*, post 538.

(k) 6 *Term Rep.* 591.

defendant to move to set it aside and to enter up a nonsuit, if the court of *King's Bench* should be of opinion that the plaintiff ought not to recover.

The principal question in the cause was, whether *Thornton* had power under this letter of attorney to accept bills of exchange for the defendant; because, if he had, the verdict was right. By the letter, after reciting that the defendant had been appointed executrix of *J. Baillie* who was entitled to considerable sums of money on mortgage, bonds, bills, notes, unsettled accounts, &c. the defendant appointed *Thornton* her attorney, as executrix, to ask, demand, sue for and receive all sums, &c. "which at the time of *J. B.*'s death were due to him and which were then due to her as executrix;" in her name as executrix, to adjust and settle all accounts, differences, &c. wherein she, as executrix, was interested; to submit the same to arbitration (if necessary,) and for that purpose in her name as executrix to execute any bond, &c. to execute for her and in her name, as executrix, assignments of mortgages, receipts, releases, &c. for her, and in her name, as executrix, and agreeably to the due course and order of law to pay all debts, &c. due from her as executrix, whether on mortgage, bond, bill, note, or otherwise; and generally for her, as executrix, to do all such farther acts for receiving debts and discharging the powers given by the letter of attorney; and giving full power to do and act "*touching and concerning all or any of the said premises as effectually to all intents, constructions, and purposes whatsoever, as she as executrix could, &c.*"

A motion was accordingly made to set aside the verdict and enter a nonsuit; but the counsel for the plaintiff contended that as *Thornton* was expressly authorised to receive and pay all sums due to and from the defendant, to refer any matters in dispute between her and any other person to arbitration, and generally to do all further and other lawful and reasonable acts as to him should seem proper, he had power to bind the defendant by accepting the bill in question on her account, it being for a legal debt due from her as executrix.

For the defendant it was argued that the accepting of this bill by *Thornton* was an excess of authority not warranted by the power, because it would charge her in her own right, whereas the letter of attorney only authorised *Thornton* to bind her as executrix, the letter being cautiously drawn with that view

The court said that though they had no doubt about the case, yet as there was a similar cause (said to be) depending in the court of

of *Common Pleas* (1) on the construction of the same letter of attorney, it would be proper not to decide this case until they had had an opportunity of conferring with the judges of that court on the subject.

On a subsequent day Lord *Kenyon* Ch. J. said, "there was no reason why the court should any longer suspend their judgment in this case, as they were all clearly of opinion that *Thornton* had no authority to bind the defendant by accepting the bill of exchange on her account, and consequently that the action could not be maintained. That they had consulted with the judges of the court of *Common Pleas*, who authorised him to say that they concurred in this opinion respecting the construction of the letter of attorney, but that there were other circumstances in that case." The rule for a nonsuit was made absolute accordingly.

The case alluded to by the court of *King's Bench* is *Howard v. Baillie*, (m) in which it was decided, that if a person, acting for an executor under a power of attorney, thereby authorizing him to transact the affairs of the testator in the name of the executor, as executor, and to pay, discharge and satisfy all debts due from the testator, accepts a bill of exchange in the name of the executor, for the amount of a debt due to a creditor from the testator, and the executor afterwards admits that the bill so accepted is for a just debt, and that it ought to be paid, the executor is personally liable *de bonis propriis*.

So, if an executor bind himself by a personal engagement to perform an award, or if the submission to arbitration be a reference not only of the cause of action, but also of the question whether he has or has not assets, and the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to determining, as between the parties, that the executor had assets to pay the debt: and the executor is concluded by the award; although it will not operate as an admission in any other suit: and he may be attached for nonpayment. (n)

5. Of a Debtor making his Creditor Executor; et vice versa.

If a debtor appoint his creditor his executor, the latter is allowed to retain his debt in preference to all other creditors of an equal degree. (o)

(1) *Howard v. Baillie*, the following case.

(m) 2 H. Bl. 618.

(n) *Barry v. Rush*, 1 Term Rep. 691.

(o) *Wentw. Off. Executors* 91. *Toller's Law of Executors*, Book III. cap. 3.

So, if a debtor make his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator.

Thus, in the case of *A. and J. Rawlinson v. Shaw* executor of *Woodhouse*, (p) which was an action of *assumpsit*; and the eight first counts in the declaration were on promises made by the testator; the last count was on a promise by the defendant as executor. To the first eight counts the defendant pleaded that *Woodhouse*, the testator, in his lifetime, (to wit,) on, &c. duly made and published his last will and testament in writing, and thereof constituted and appointed the defendant and *J. Rawlinson*, and three other persons, joint executors; and soon afterwards died without altering or revoking it. And as to the last count, that that promise and undertaking (if such were made) was made by the defendant together with the said *J. Rawlinson*, and those three persons, and not by the defendant alone. The plaintiffs by their replication said that *J. Rawlinson* never proved the will of *Woodhouse*, nor took upon himself the burthen of the execution thereof, nor in any manner whatsoever ever accepted of the supposed appointment of him the said *J. Rawlinson* to be an executor of the said will, nor ever administered any goods or chattels which were of the said *Woodhouse* deceased at the time of his death, as executor of the last will and testament of the said *Woodhouse*. And as to the other plea they replied that the promise in the last count was not made by the defendant together with *J. Rawlinson*, and the other three persons as in the plea alledged.

To the replication to the first plea there was a general demurrer, and joinder in demurrer.

In support of the demurrer it was contended that the nomination of the plaintiff as executor in the will of *Woodhouse* the testator operated as a suspension of his legal remedy, as he had not actually renounced, though not to an extinguishment of the debt, or even to a suspension of his remedy in a court of Equity. If so, the plea is a bar to the action, and the fact disclosed by the replication does not vary the case. All the legal parties to a contract must by law sue and be sued, which is sufficiently proved by the usual plea in abatement where any of the parties are omitted

to be named; and though this rule has some exceptions with regard to defendants, it is universal as to plaintiffs. Now here, the plaintiff not having renounced, must in a court of law be considered as having all the legal qualities of executor still attached to him, and therefore cannot sue the defendant in his character of co-executor: for one executor cannot sue his co-executor, the former being supposed in contemplation of law to be equally in possession as joint tenant of all the testator's assets, *Went. Off. of Executors* 100, out of which he may pay himself: and the effect of a judgment against an executor is rather to attach on the property of the testator than on the person of the defendant. In *Co. Litt.* 264. b. it is said that if the obligor make his obligee his executor, this is a release in law of the action. But the duty remains for which the executor may retain. *Wankford v. Wankford*, *Salk.* 299. *Fryer v. Gildridge*, *Hob.* 10. and 2 *Show.* 401, where it is added that the debt is not extinguished, but only superseded, as to the executor. *Plowden* 184, 5. gives the reason why the action is gone, because in judgment of law the plaintiff is satisfied before; for if the executor has as much goods in his hands as his own debt amounts to, the property in these goods is altered and vested in himself, that is, he has them as his own goods in satisfaction of his debt, and not as executor. If the case of *Dorshester v. Webb*, *Sir W. Jones* 345, be cited on the other side, it is distinguishable from the present; for that case only shews that were the obligee had been made co-executor with another, and had renounced, the executor of the obligee might sue the surviving executor. It is indeed given as a reason in that case, that when an obligor makes the obligee and another his executors; and the obligee refuses the debt is neither released nor discharged, and the obligee may sue the assets; but that was an *obiter dictum* not necessary for the decision of the case before the court: and there too it must be taken that he had legally renounced; and by the death of the obligee the period of suspension had ceased, and the whole of the property had gone into another channel, namely into the hands of the surviving executor. But here the plaintiff has not legally renounced.

The counsel for the plaintiff was stopped by the court: and Lord Kenyon, Ch. J. said, "It is impossible to entertain the least doubt in this case. The argument is that if *A.* owe *B.* a sum of money and chuse to make him his executor, though *B.* will not act, his legal remedy is extinguished. The proposition is too monstrous
to

to admit of any argument. If indeed the creditor had accepted of the executorship, and acted, there might perhaps have been something in it. But the facts disclosed by the replication positively negative that; for it is there averred, that he never proved the will, nor took upon himself the burthen of the execution thereof, nor in any manner whatsoever accepted of the supposed appointment to be an executor, nor ever administered, &c. And notwithstanding this he is now told that he cannot enforce the payment of his debt in a court of law. I should have been extremely sorry, to have found myself bound by authorities to accede to such a position: and I am glad that none are found to warrant it, and that there is one direct authority against it. There is no pretence therefore for this demurrer; and even if it could have been supported, it would be dishonest in the extreme."

Buller, J. said: "The argument in support of this demurrer is fully answered by the plain words of the replication. The foundation of the argument is, that this is an action in respect of property, and that the plaintiff has possession of that property: but the replication pointedly states that he never proved the will, nor in any manner whatever acted as executor, nor administered. Then if he has not the possession of the property of the testator, he stands in the same situation as any other stranger, and may equally sue the person, who has legal possession of that property." The Court accordingly gave judgment for the plaintiff.

But if a creditor appoint his debtor executor, such appointment shall operate as a release and extinguishment of the debt, on the principle that a debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action against himself, his appointment by the creditor to that office discharges the action, and consequently discharges the debt. (g) Thus, of the obligee of a bond make the obligor executor, this amounts to a release at law of the debt: (r) if several obligors be bound jointly and severally, and the obligee constitute one of them his executor it is an extinguishment of the debt, and the executor is incapable of suing the other obligors. (s) The debt is also released where only one of several executors is in-

(g) *Vide Toller's Executor* 348. *Book 3. ch. 4. s. 9.* (r) 8 Co. 136.
(s) *Went. Off. Executors* 31. 11 *Vin. Abr.* 398.

debted to the testator, for one executor cannot maintain an action against another; (t) and after the death of such executor, the surviving executors cannot sue his representative for the debt. (u) Nor is the case varied by the executor's dying without having proved the will, or having administered, (x) or even by his refusal to act with his co-executors, (y) unless he formally renounced the office in the spiritual court; such a renunciation, indeed, shall prevent the release of his debt; for he could no more be compelled to accept a release than a deed of grant. (z)

It is observed (a) that in all these cases the legal remedy is destroyed by the act of the party, and, therefore, is for ever gone; but the effect is different where it is suspended merely by the act of law; as if administration of the effects of a creditor be committed to the debtor, this is only a temporary privation of the remedy by the legal operation of the grant: thus, if the obligor of a bond administer to the obligee and die, a creditor of the obligee having obtained administration *de bonis non* may maintain an action for such debt against the executor of the obligor.

6. Of an Executor *de son tort*.

If a person without any appointment of the testator assume the office of executor, by taking possession of the assets, paying debts, or otherwise administering the effects; such a one is styled an executor *de son tort*, or an executor of his own wrong. (b)

In the second resolution in *Read's case*, (c) it is said, that if an executor is made, and proves the will; if a stranger takes any of the goods of the testator claiming them as his own, he is not executor of his own wrong; because there is another executor of right, whom the creditor may charge; but although there be an executor who administers, yet if the stranger takes the goods, and claiming to be executor, pays debts, he may for such express administration be charged as executor of his own wrong. And the third resolution was, that where the defendant takes the goods be-

(t) *Went. Off. Executors* 31. (u) *Ib.* 32. *Plow. Com.* 264. *Leon.* 320.

(x) *Salk.* 300. *Plow. Com.* 184. *Went. Off. Executors* 31.

(y) *Salk.* 308.

(z) *Ibid* 307.

(a) *Toller's Executor*,

348. and see the cases there cited.

(b) *Vide Toller's Executor*, Book I. ch. 11. s. 2.

(c) 5 Co. 33. b.

fore

fore the rightful executor hath taken upon him or proved the will, he may be charged as executor of his own wrong.

So, if *A.* the servant of *B.* sell the goods of *C.* an intestate, as well after his death, as before, though by the orders of *C.*, and pay the money arising therefrom into the hands of *B.*: *B.* may be sued as an executor *de son tort*. But what acts make a person liable as executor *de son tort* is matter of law for the judge to decide; it is only for the jury to say, whether the acts are sufficiently proved.

Thus, in the case of *Padget*, and another *v. Priest* and *Porter*, (d) which was an action of *assumpsit* for goods sold and delivered against the defendants as executors of *W. Shore*. They severally pleaded, 1. the general issue; 2. that they were not executors; and, 3. that they had fully administered. At the trial before *Buller*, J. the plaintiffs proved the delivery of the goods in question to *W. Shore*, who was a publican. A few days previous to his death the intestate sent to *Porter*, his brewer, desiring him to send a man to take charge of the cellar, and to draw the beer, who sent *Payne* his servant. *Payne* sold beer as well after the intestate's death as before. The intestate likewise ordered *Payne* to sell some hogs, which he did after his death, and paid into *Porter's* hands the produce of them, and of the beer which was sold after the death of *W. Shore*. On the 7th of *December* 1786, administration was granted to *J. Shore*, who afterwards brought actions against these defendants for money had and received. On the 3d of *February* 1787, *Priest* paid 8*l.* and on the 10th of *February*, *Porter* paid 4*l.* into court, on those actions. On the 31st of *January* the defendants pleaded in this action, which had been commenced on 23d of *December* preceding. Verdict for the plaintiffs. But a rule was obtained calling on the plaintiffs to show cause why there should not be a new trial, on the ground that there was no evidence to prove the defendants executors *de son tort*; or at most only slight evidence of facts done by them, which ought to have been left to the jury to consider with what view they had acted; and that at all events there was no evidence to affect *Priest*.

Buller, J., after reporting the above facts, said, that considering *Priest*, merely in the light of a servant, he should have been desirous of obtaining a verdict in his favour, if that could have

(d) 1 Term Rep. 97.

been done consistently with the evidence ; but in fact he had paid money into court, in another action brought against him by the administrator, which was decisive against him.

And the court decided that the defendants had made themselves executors *de son tort* ; and therefore discharged the rule.

Ashhurst, J. said : " It is very clear upon the evidence that the money in the hands of the defendants belonging to the intestate was not paid over to the rightful administrator when this action was brought ; and therefore they cannot justify it under any plea. Though they might have excused themselves by paying the money over before action brought, yet not having done so they have made themselves executors *de son tort*."

Buller, J. also said : " The plaintiffs, who were creditors of *W. Shore*, find *Priest* and *Porter* selling his goods, and as they had no means of knowing whether they were lawful, or wrongful executors, they looked upon them from their acts in the character of rightful executors. They therefore brought this action against them as executors : they proved effects of the intestate in their hands ; that they sold them after the intestate's death, and that at the time when this action was brought, and even when the defendants pleaded in this action, they had money of the intestate in their hands. I cannot agree with the defendant's counsel that the question whether the executors *de son tort* or not is to be left to a jury ; that is a conclusion of law ; whether the defendants had effects belonging to the intestate or not, and whether they sold them, were indeed questions to be left to a jury ; but when those facts are established, the result from them is a question of law ; and it is clear from all the cases, that the slightest circumstance will make a man an executor *de son tort*. It is said in *Dyer* 166. b. that if a man even milk the cows, or take a dog of the intestate, that will constitute him an executor *de son tort*. With respect to *Porter*, it clearly appears from the evidence that he meant to pay himself by intermeddling with the intestate's affairs : but as to *Priest*, if there had been any circumstances in his favour I would have left it to the jury to find for him. But I could not do so when it appeared that at the time of the plea pleaded he had money of the intestate's in his hands. With regard to the rule of the wrongful acts of the stranger being purged by the subsequent assent of the rightful administrator, that cannot apply to the case of third persons ; it only applies to the acts of the administrator himself. If indeed previously

previously to the action brought against the defendants as executors *de son tort*, they had paid the money over to the rightful administrator, that would have been a good defence; because then they would have applied the money properly. So that the courts have gone thus far, that if an action brought by a rightful administrator against an executor *de son tort*, whatever may have been disposed of in the course of administration, as by paying debts, &c. shall be allowed to him in damages. But that does not apply to this case, where the creditors find money in the hands of the defendants at the time of bringing the action.

So, in the case of *Edwards v. Harben*, (e) it was determined, that if a creditor takes an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as executor *de son tort* for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors. It is a general rule in the transfer of chattels, that the possession must accompany and follow the deed. Therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed.

So, an executor *de son tort* cannot discharge himself from an action brought by a creditor by delivering over the effects to the rightful executor after the action is brought: nor can he retain for his own debt of a higher nature by consent of the rightful executor given after the bringing of the action by the creditor.

Thus, in the case of *Curtis* and another *v. Vernon* executor of *Palmer*, (f) which was an action on the case on promises by the testator. The defendant pleaded that *Palmer* died intestate, and that the defendant was never executor, nor ever possessed any of his goods, save as executor of his own wrong; that after *Palmer's* death, and before the 14th of May 1789, administration was granted to his widow *S. Palmer*; and that on the 15th of May 1789 the defendant delivered over to the administratrix all the goods, &c. belonging to the intestate which came to his hands. 4thly, That the defendant never was executor, &c. save as execu-

(e) 2 Term Rep. 587.

(f) 3 Term Rep. 557.

tor of his own wrong; that administration was granted to *S. Palmer* (as before); that the defendant recovered 300*l.* on a bond in this court in the intestate's lifetime; that no goods or effects of the intestate came into the defendant's possession, except goods of the value of 79*l.* 13*s.* 9*d.* which are not sufficient to satisfy his said debts; and that the administratrix, on the 15th of *May* 1789, assented to his retaining those goods in satisfaction of his debt.

To the two last pleas there was a general demurrer, and joinder in demurrer. And in support of the demurrer, the counsel for the plaintiff argued thus, "The third plea cannot be supported, because it appears from all the authorities on this subject that an executor *de son tort* cannot purge his tortious act after an action is brought against him by delivering over the goods of which he has taken possession, to the rightful administrator; though he may discharge himself by delivering them over previous to the commencement of the action. *Keble v. Osbaston*, *Hob.* 49. *Bradbury v. Keynel*, *Cro. Eliz.* 565. *Salk.* 313. *Anonymous.* and *Padget v. Priest*, 2 *Term Rep.* 97. For in the language of one of those cases, 'having once made himself chargeable to the plaintiff's action, as being executor *de son tort* he shall never afterwards discharge himself by matter *en post facto*.' The fourth plea is also bad; because an executor *de son tort* cannot retain in satisfaction of his own debt; as that would not only enable him to take advantage of his own wrong, but would occasion a contention among the creditors to take possession of the intestate's effects without any authority in law. *Coulter's case*, 5 *Rep.* 30. Neither can he retain with the assent of the person who afterwards becomes the rightful administrator, since that would be attended with the same inconvenience."

On the other side it was argued in support of the 3d plea, that an executor *de son tort* cannot be charged with more than the value of those goods of the intestate of which he has taken possession; and he may discharge himself from being liable even thus far by delivering over the goods to the rightful administrator. 1 *Mod.* 213. Otherwise an executor *de son tort* might be doubly charged; first by any creditor of the intestate for the value of the goods taken; and adly, by the administrator in trover; for the first recovery would be no bar to the action of the administrator. And such executor is equally discharged by delivering over the goods to the right administrator, whether the action be or be not commenced, provided

provided the delivery be made before plea pleaded; as will appear by the reasoning of the cases cited on the next point. As to the fourth plea; if after action brought and before plea pleaded, the executor take out letters of administration, he may plead a retainer for his own debt; though the taking administration does not abate the writ. *Whitehead, v. Sampson, Freem.* 265; 2 *Show.* 373; *Baker v. Berisford*, 1 *Sid.* 76; 2 *Ventr.* 180; *Williamson v. Norwich, Sty.* 337; 1. *Rel. Abr.* 923. L. pl. 12; and *Vaughon v. Brown*, 2 *Str.* 1106; *Andr.* 328. If then the defendant himself might have retained in satisfaction of his own debt in the event of letters of administration having been granted to him even after the action was brought, and this he might have done as his debt was of a higher nature than the plaintiff's, it seems to follow that he may also retain with the assent of the rightful administrator, and that the assent is stated in the plea.

But Lord *Kenyon* Ch. J. in delivering the opinion of the Court, said, "They had looked into the authorities which were cited on the part of the defendant, but that they did not establish the propositions for which they were adduced. The case in 1 *Sid.* 76. is reported in a confused manner; but it concludes with saying, "that an executor *de son tort* cannot pay himself." Now that goes the length of deciding the present case: And indeed the cases cited from *Freem. Yelv. Moor, Mod.* and *Strange*, all prove the same point, that an executor *de son tort* cannot retain for his own debt. They also take the distinction between such an executor, and an executor *de son tort*, afterwards legalizing his own wrong by taking out letters of administration: The case in *Strange* shows this matter very clearly, where the Court said it would be extremely hard that, if a person entitled to administration is opposed in the *Ecclesiastical Court*, and does any act *pendente lite* to make himself executor *de son tort*, those acts should not be purged by his afterwards obtaining letters of administration. And they added that the granting administration legalizes those acts which were tortious at the time. With respect to the first point in this case, the opinion of Lord Ch. J. *Holt*, in *Salk.* 313, is decisive; where he says, "If *H.* get the goods of an intestate into his hands, and administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action is brought, and then he may plead *plene administravit*." From all the authorities it is clear, first, that an executor *de son tort* must deliver over the goods of

the intestate to the rightful administrator, before an action is brought against him, and 2dly, that, though he be a creditor of a superior nature, he cannot retain in satisfaction of his own debt. Therefore we are of opinion that both these pleas are bad, and consequently there must be judgment for the plaintiffs."

But a man who possesses himself of the effects of the deceased under the authority, and as agent for the rightful executor, cannot be charged as executor *de son tort*.

Thus, in the case of *Hall v. Elliot*, executor of *Elizabeth Codden*, widow, who was the executrix of her late husband *Patrick Codden* deceased, (g) which was an action of *assumpsit* for goods sold and delivered to the testator *Patrick Codden* in his lifetime. The defendant pleaded that the testator *Patrick Codden* made his will and appointed *Elizabeth Codden* and *Rowland Conyers* executrix and executor thereof, that they both proved the will, and afterwards *Elizabeth Codden* died, and that *Rowland Conyers* was still alive. And the defendant further says, "that he never did, as the executor of the said *Elizabeth Codden* who was the executrix of the said *Patrick* as aforesaid, administer any goods or chattels," &c. The replication traversed this last averment.

Lord *Kenyon*, Ch. J. before whom the cause was tried, stopped the counsel upon the opening of the pleadings, and said he thought this action could not be maintained. Here is a surviving executor who has acted, and he alone is answerable. If the defendant has possessed himself of any goods, he is answerable to the surviving executor for them, and that executor must distribute them amongst the creditors.

The counsel for the plaintiff cited *Read's* case, 5 Co. 33. which he contended showed that this action might be supported, though he admitted that an action would also lie against the defendant at the suit of *Conyers* the surviving executor; and observed that the objection was on the record. Lord *Kenyon* said he would permit the cause to go on, though he had no doubt in his own mind that the action could not be maintained, as it was impossible there should be a lawful executor, and an executor *de son tort*, at the same time. The cause accordingly proceeded, but *Conyers*

(g) *Peake's Cas. N. P. 86.*

the surviving executor proving that the defendant acted as agent for him, and accounted with him for the money he received, the plaintiff was nonsuited.

7. *Of an Executor's Liability to be sued for a Legacy.*

In the cases of *Atkins and wife v. Hill*, (b) and *Hawkes and wife v. Saunders*, (i) it was held that an action of *assumpsit* will lie against an executor upon an *express* promise to pay a *pecuniary legacy issuing out of personal property*.

But no action at law will lie against an executor for a *pecuniary* legacy upon an *implied assumpsit* on account of the sufficiency of assets; the legatee's only remedy being in equity.

Thus, in the case of *Deeks and wife v. Strutt*, (k) which was an action brought in *assumpsit* for the arrears of an annuity bequeathed to the plaintiff's wife by the defendant's testator; wherein the declaration stated, that *Robert Canham* the testator bequeathed to the plaintiff *Maria* 40s. a-year for her life, payable quarterly; that he appointed the defendant his executor; that after his death the defendant proved the will; and then averred that divers goods and chattels of the testator came to the hands and possession of the defendant to be administered, fully sufficient to pay and satisfy all the debts, legacies, and funeral expences of the testator, and charges of proving the will; and that the defendant was possessed of a great part of the said goods and chattels, being fully sufficient to pay and satisfy the debts, legacies, funeral expences, &c. then unpaid and unsatisfied; whereby and according to the form and effect of the said will, the defendant became liable to pay to the said *Maria* the sum of 40s. a year in manner aforesaid; and being so liable, he promised to pay her, &c.; and then averred that three years and three quarters arrears of the annuity were due. At the trial of this cause a verdict was found for the plaintiffs for 7l. 10s. subject to the opinion of the court of *King's Bench* upon the following case: "The testator *Robert Canham* made his will dated the 31st January 1774, in which amongst other things, he gave to his

(b) *Cowp.* 284. (i) *Ib.* 289. See also *Lewis v. Lewis*, 1 H. Bl. 111. n. a. (k) 5 *Term Rep.* 690. See also *Parish v. Wilson*, *Peake's Cas. N. P.* 73. S. P.

daughter *Maria*, the wife of the plaintiff, to her separate use, an annuity of 40*s.* for her life payable quarterly. The defendant *Strutt*, who is the surviving executor named in the will, which was proved in the prerogative court on the 20th of *May* 1773, paid for several years the annuity up to *Lady-day* 1792. The defendant never made any express promise to pay; but was possessed of assets sufficient to have paid the plaintiff's demand, if parol evidence of an acknowledgement of having assets, without any other evidence of assets come to his hands, be sufficient evidence thereof. The case then stated a demand and refusal of the arrears.

The Court determined that this action was not maintainable.

Lord *Kenyon* Ch. J. said: "The supporting of the present action would be attended with the most pernicious consequences; and I believe that no action till lately (except one in the time of the common wealth) for a legacy has been supported in a court of law. The arguments, which have of late years been advanced in support of this action, are founded on the supposed justice of the case and the convenience of the parties: but when it is considered in what manner a court of equity interposes in suits for legacies in taking care that provision is made for the different parties intitled, and what inconvenience and even ruin to private families would have ensued from determining that an action can be brought in a court of law for a legacy, I think that those who have wished to support the action in a common law court would hesitate before they came to the conclusion that the action can be maintained. If an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover; and therefore when the legacy is given to a wife, the husband would recover at law, and no provision could be made for the wife or her family: whereas a court of equity will take care to make some provision for the wife in such a case; but the whole of this admirable system, which has been founded in a court of equity, will fall to the ground, if a court of law can enforce the payment of a legacy. I mention these as decisive reasons in my mind against the jurisdiction of the courts of law over this subject; and I know that they have influenced those who once entertained an idea that this action could be supported. The only case (1) that I know of

(1) Vide *Nicholson v. Shirman*, 1 *Sid.* 46.

where it was said that this action might be maintained happened in the time of the commonwealth; but the reason there given was to prevent a failure of justice, the *Archbishop's Courts* being at that time abolished, and the court of *Chancery* not having then, nor indeed until the time of Lord C. *Nottingham*, entertained any jurisdiction over the question of legacies. Therefore as the arguments of convenience and justice, on which alone it has been thought that this action is maintainable at law, bear strongly against it, and as I only find one case, in which it has been supported, and which was decided contrary to all precedent, merely because the party had then no other remedy, I am clearly of opinion that the present action cannot be maintained."

Ashurst, J. "As this is a question of infinite importance to the public, I am glad that the case was reserved in order that the question may be settled. *Prima facie* it is a strong objection against such an action as the present that only one instance is to be found in which it has been supported; and the reason of that has been explained by my Lord Chief Justice. Policy and convenience are also against the jurisdiction of the courts of common law over this subject; in a court of law we cannot impose any terms on the party suing; if he be entitled to a verdict, the law must take its course: but a court of equity will impose on the party applying such terms as they think right and according to conscience. Innumerable instances have occurred in which the interposition of that court has proved highly beneficial to private families, by compelling the husband to make an adequate settlement on the wife: but if we were now to determine that an action at law could be maintained for a legacy, wives and families in many instances would be left destitute of any provision."

Gross, J. "The ground of this action, as it appears on the declaration, is that in consideration of assets, the defendant promised to pay this annuity. It is not pretended that the defendant made any express promise to pay; and the question is, whether under these circumstances the law does or does not imply such a promise; no case has been cited to shew that it does. There is one case (m) in the books, where the declaration states that, in consideration of

(m) *Davis v. Wright*, 1 *Vent.* 120. See also *Cro. Eliz.* 91. S. P.

a forbearance by the plaintiff to sue, the executor promised to pay the legacy; and the court held that the action might be maintained; but the circumstance of that action being brought on a promise in consideration of forbearance, shows that it was understood that the bare possession of assets was not alone sufficient. This is a novel attempt; and I am of opinion that the action cannot be supported.

But an action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest.

Thus in the case of *Doe* on the demise of Lord *Saye and Sele*, v. *Guy*, (n) which was an ejectment for a certain leasehold house and premises. It appeared that the lessor of the plaintiff claimed the premises in question under a bequest of the lease thereof from *Mrs. Mary Guy*, to whom the defendant was executor; that soon after the death of the testatrix, which was in *January* 1802, upon Lord *Saye and Sele*'s application to the defendant to deliver up the possession of the house, he returned for answer by letter, that it was not convenient for him to remove before *Michaelmas* then next, at which period, but not before, he was willing to resign it. By a subsequent letter the defendant informed the lessor that he was ready to resign the house on the 25th of *April*. This was ruled by Lord *Ellenborough*, Ch. J. before whom the cause was tried, to be evidence of the defendant's assent as executor to the bequest. But it being contended further, upon the authority of *Deeks* v. *Strutt*, that no action at law would lie to recover a legacy, which was in substance the case here; a verdict passed for the plaintiff with liberty to the defendant to move the court of *King's Bench* to set it aside, and enter a nonsuit. A rule nisi was accordingly obtained for this purpose.

Upon showing cause against the rule the counsel for the plaintiff argued that the case relied on of *Deeks* v. *Strutt* was where an annuity was devised payable out of the general funds of the testator, which had been paid for several years by the executor; but there was no express promise to pay the arrears for which the action was brought: and the question there was, whether the acknowledgments of assets by the defendant were sufficient to raise an *implied assumpsit* in law to continue the payments as they became due. That differs from a bequest of a specific thing, to

(n) 3 *East Rep.* 120.

which

which the executor has expressly assented, in which case there are many authorities in the books to show that such assent passes the legal title under the will.

The counsel for the defendant relied on the ground of the decision in *Deeks v. Strutt*, which applied as well to the case of a specific legacy as of a legacy payable out of the general fund; namely that no action at law lay to recover it against the executor, because a court of law could not in many instances do that justice to the parties concerned as a court of equity were accustomed to do: for the latter would in the case of a legacy to a married woman oblige the husband to make a suitable provision for her, if she were not before sufficiently secured. Whereas this court could not impose terms on one who was entitled to recover upon his legal title. The opinion of the judges in that case was delivered generally against supporting an action at law for a legacy, without the distinction now set up. The cases of *Atkins v. Hill*, and *Hawkes v. Saunders* were indeed cases of express promises; but the reasoning there went the whole length of this case, if it had been well founded; but it was controverted and considered to be overruled in *Deeks v. Strutt*.

The Court, however, determined that this action was maintainable. Lord *Ellenborough* Ch. J. said: "General language used by the court in giving their opinions in any case must always be understood with reference to the subject matter then before them. The question of *specific legacy assented to by the executor* was not before the court in *Deeks v. Strutt*, but whether the law would raise an implied promise on proof of an acknowledgement of assets by the executor, so as to sustain an action against him, for an annuity, payable out of the general funds of the testator. But it never could be doubted but that at law the interest in any specific thing bequeathed vests in the legatee upon the assent of the executor. If it should afterwards appear that there is a deficiency of assets to pay creditors, the court of *Chancery* will interfere and make the legatee refund in the proportion required. It makes no difference whether the bequest be of a *personal* or *real* chattel: but according to the doctrine laid down in the cases cited of *Paramour v. Yardly*, (o) and *Yeung v. Holmes*, (p) and the passage from 4 *Rep.* 28.

(o) *Plowd.* 539.

(p) 1 *Str.* 70.

the assent of the executor once given to a specific legacy, vests the interest at law irrevocably; and this is not broken in upon by any subsequent case. Now here was ample evidence of an express assent by the executor; for he appointed a certain day for giving up the possession of the house to the lessor of the plaintiff; and therefore the latter is entitled to recover."

Grose J. "The only question in the case of *Deeks v. Strutt*, was whether the law would raise an *implied assumpsit* to pay the annuity, upon proof of the executor's acknowledgment of assets. I thought it would not: but this is the case of a specific legacy, in which all the authorities show, that upon the assent of the executor, the interest vests at law in the legatee."

Lawrence J. "What was said by the court in *Deeks v. Strutt*, must be taken with relation to the case then before them, which was an action for a legacy not founded upon any express assent of the executor, but endeavoured to be supported upon an implied assent in law, on account of a sufficiency of assets, which implication the Court held that they could not raise. All the Court treated it as a new attempt, and therefore they could not have intended to apply the same doctrine to a case like the present, where there was an assent by the executor to the specific legacy; for there are many authorities in the books, in support of such an action; as in *Duppa v. Mayo*, (q) where in an action against the representative of an executor for the arrears of an annuity bequeathed by the testator out of a term of years, a general consent of the executor to the legacy is alledged in the declaration; on which there was judgment for the plaintiff. So in *Saunders's case*, (r) it said, "if lessee for years devise his term to another, and make executors and die; and the executors do waste, and afterwards assent to the devise; in that case, although between the executors and the devisee, it hath relation, and the devisee is in by the deviser; yet an action of waste shall be maintainable against the executors in the *tenuit*. There, however, Lord Coke clearly considers that the assent of the executor vests the term in the legatee from the death of the testator. The same question came on in another case of *Chamberlain v. Chamberlain*: (s) *Thomas Chamberlain*, made his wife executrix, and bequeathed a lease to her for

(q) 1 Saund. 278.

(r) 5 Co. 12. b.

(s) 1 Chan. Caf. 256. life.

life, remainder to his son for life, remainder to his first son and his heirs male. The wife assented, and died, having made *Croft* her executor. There being a deficiency of assets, the question was, if *Croft* could sell the lease? And the Lord Keeper *Finch* declared the lease should be assets, notwithstanding the assent. But that after such assent, *J. Chamberlain*, the son, had sold the lease to a third person *bonâ fide* this had defeated the creditors; for this had been a good title at law: and the purchaser should not be defeated by this trust for creditors. Therefore the Lord Keeper in terms said that the effect of the assent of the executrix was to vest the term in the legatee; though he would be considered as a trustee for the creditors in the event of a deficiency of other assets. Also in *Bastard v. Stukeley*, (t) one devised goods to *A.* and *B.*; the executor assented to the legacy, and afterward *A.* died: and now the executor of *A.* sued in the *Spiritual Court* for *A.*'s share, there being no survivorship in such case by the laws ecclesiastical. And prohibition was granted upon demurrer and argument: for by the assent of the executor the interest was invested in the legatees, and became a chattel governable by the rules of the common law. That was the case of a chattel personal. But *Barton's case*, (u) which came on to be argued on a demurrer to the prohibition, appears to distinguish between the case of a general and specific legacy. Inasmuch as it appeared by the suggestion that the executors had consented to take as legatees, and by this means the property vested in them as legatees, and was altered from what it was when they were executors; for when they were executors one might have granted away all the goods, but after taking as legatees one could grant but a moiety. And it is added, when a certain thing, as a horse or a cow, is devised, as soon as the executor assents, the property vests in the legatee, and he may have an action at common law for the recovery of the thing: and therefore differs from the case in 2 *Roll. Abr.* 301., for that was for a legacy for which the common law gives no remedy. That must be understood to mean a legacy payable out of the general funds of the testator, in contradistinction to a legacy of a specific thing."

Le Blanc J. "It is admitted that upon the old authorities there is no doubt of the plaintiff's right to recover, unless they have been overruled by the case of *Deeks v. Strutt*. But that never could

(t) 2 *Leq.* 209.

(u) *Freem.* 289.

have been in the contemplation of the Judges there; because it formed a ground of objection with them to the action, that it was a novel attempt to contend that the law would raise an *implied assumpsit* against an executor merely from the possession of assets. They thought that it would not: and in discussing that point, they showed the inconvenience which would result from extending the law in that respect further than it had been carried before. The case of *Chamberbaine v. Chamberlaine*, (u) shows exactly the situation in which a specific legatee stands in the judgment of a court of equity, when the executor has assented to the legacy: that it vests the interest at law. Here there was no pretence stated even of any equitable ground why the plaintiff should not recover. It was not pretended that from any deficiency of assets the specific legatee was likely to be called upon to refund if he recovered: and even now if there were any ground for it, the court of *Chancery*, even after the assent of the executor, might reach the property in the hands of the devisee, as appears from the case of *Chamberlaine v. Chamberlaine*."

(u)-2 *Eq. Caf. Abr.* 465. 2 *Freem.* 141.

END OF THE FIRST VOLUME.



Stanford Law Library



3 6105 06 161 802 6